TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 596

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, ET AL., PETITIONERS,

vs.

NEW YORK LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 23, 1937.

CERTIORARI GRANTED JANUARY 3, 1938.

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PETITIONER,

vs.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 15, 1938.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA

Docket Entries

Feb. 14, 1935. Bill of complaint filed.

Feb. 14, 1935. Subpoena issued.

Feb. 14, 1935. Order of court filed & entered permitting plaintiff to pay into the registry of the court the sum of $1045.42; defendants are restrained from instituting any action against plaintiff; rule granted to show cause why temporary restraining order should not be continued and a preliminary injunction issue; rule returnable Feb. 23, 1935; plaintiff to file bond in the sum of $1,000.00.

Feb. 18, 1935. Bond of New York Life Insurance Co. filed by leave of court.

Feb. 19, 1935. Acceptance of service of bill of complaint and order filed by defendants.

Feb. 23, 1935. Order of court filed & entered making rule absolute and the defendants are enjoined from proceeding with any action including the action at No. 353 Jan. Term 1935 in the Court of Common Pleas of Jefferson County on account of the policies of insurance or from transferring said policies.

Feb. 25, 1935. On motion of defendant order entered striking off decree of February 23, 1935 and extending return day of rule to March 2, 1935.

Feb. 25, 1935. Praecipe for appearance de bene esse of Margiotti, Pugliese, Evans & Reid for defendants, filed.

[fol. 2] Mar. 2, 1935. Motion to dismiss bill of complaint filed by defendant.

Mar. 2, 1935. Motion to dissolve temporary injunction filed by defendant.

Mar. 4, 1935. Subpoena returned not served.

Apr. 13, 1935. Opinion on defendants' motion to dismiss bill of complaint and to dissolve temporary order filed and order entered directing that both motions will be denied; orders may be submitted accordingly.

Apr. 16, 1935. Order of court filed & entered overruling defendants' motion to dismiss bill of complaint and to dissolve temporary injunction; rule granted Feb. 14, 1935 is hereby made absolute; defts. are enjoined from in-

stituting any proceedings; defendants have 15 days to answer; exception noted to defendants and bill sealed.

Apr. 24, 1935. On petition of defendants, order entered allowing appeal to act as supersedeas.

Apr. 24, 1935. Citation issued returnable May 24, 1935.

Apr. 24, 1935. Assignment of errors filed.

May 10, 1935. Supersedeas and cost bond filed by order of court.

Sept. 26, 1935. Praecipe for transcript of record.

Sept. 26, 1935. Statement of evidence under Equity rule 75 filed.

[fol. 3] Sept. 27, 1935. Notice to counsel under Equity rule 75 (b) filed with acceptance of service thereon.

Sept. 28, 1935. Order made on original statement of evidence under Equity rule 75 approving same.

IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—Filed February 14, 1935

To the Honorable the Judges of said Court:

Your orator, the New York Life Insurance Company, respectfully represents as follows:

1. Plaintiff is a mutual life insurance company incorporated under the laws of the State of New York and is a citizen of said state. The plaintiff is lawfully engaged in business in the City of Pittsburgh in the Western District of the Commonwealth of Pennsylvania. The defendants are temporarily living in McCoysville, Pennsylvania, but where their legal residence is the plaintiff does not know. The defendant John G. Ruhlin has, however, brought an action of assumpsit against the New York Life Insurance Company at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, Which is within the Western District of said Commonwealth.

2. The amount in controversy in this case exceeds the sum of $3,000, exclusive of interest and costs.

3. On December 1, 1928, the plaintiff wrote its policy of life insurance No. 10,452,365 in the face amount of $10,000, [fol. 4] and its policy No. 10,452,366 in the face amount of $5,000 on the life of the aforesaid John G. Ruhlin. The

defendant Jennie B. Ruhlin is the wife of said John G. Ruhlin and is the beneficiary of the trust to be set up out of the proceeds of said two policies, with certain limitations over in case of her death before the whole fund has been paid to her. A true and correct copy of each of said policies, marked, respectively, Exhibits "A" and "B", is attached hereto and made a part hereof.

4. As a prerequisite to the issuance by the plaintiff of the aforesaid two policies No. 10,452,365 and No. 10,452,366, said John G. Ruhlin made and signed an application to the plaintiff for such insurance. As a part of said application said John G. Ruhlin on November 28, 1928, made answers to the plaintiff's medical examiner to questions contained in Part II of the application and signed said Part II of the application. A true and correct copy of said application both Parts I and II, is attached to and made a part of each of said policies. The answers contained therein are the correctly recorded answers made to the respective questions by said John G. Ruhlin. Included in the questions propounded to and answers made by said John G. Ruhlin are the following:

"8. Have you consulted a physician for or suffered from any ailment or disease of B. The Heart, Blood Vessels or Lungs? No.

10. Have you consulted a physician for any ailment or disease not included in your above answers? No.

[fol. 5] 11. What physician or physicians, if any, not named above, have you consulted or been examined or treated by within the past five years? None."

5. In his answers to the questions prior to No. 10 quoted in the preceding paragraph, said John G. Ruhlin named no physician whatever and no ailment or disease, except a herniotomy in 1912 with a good recovery.

6. Also in said application, John G. Ruhlin above his signature stated:

"On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree

that the Company believing them to be true shall rely and act upon them."

7. On July 7, 1930, the plaintiff wrote its three policies of life insurance No. 11,165,728, No. 11,165,729 and No. 11,165,730, each in the face amount of $4,000, on the life of said John G. Ruhlin. The defendants Jennie B. Ruhlin and John B. Ruhlin, a son of said John G. Ruhlin, are the beneficiaries of a trust to be created by the proceeds of policy No. 11,165,728. The defendants Jennie B. Ruhlin and William R. Ruhlin, another son of said John G. Ruhlin, are the beneficiaries of a trust to be created by the proceeds [fol. 6] of policy No. 11,165,729. The defendants Jennie B. Ruhlin and Jean L. Ruhlin, a daughter of said John G. Ruhlin, are the beneficiaries of a trust to be created by the proceeds of policy No. 11,165,730. A true and correct copy of each of said three policies, marked, respectively, Exhibits "C", "D" and "E", together with the trust agreement applicable to each, is attached hereto and made a part hereof.

8. As a prerequisite to the issuance by the plaintiff of the aforesaid three policies No. 11,165,728, No. 11,165,729 and No. 11,165,730, said John G. Ruhlin made and signed an application to the plaintiff for such insurance. As a part of said application, said John G. Ruhlin on June 26, 1930, made answers to the plaintiff's medical examiner to questions contained in Part II of the application and signed said Part II of the application. A true and correct copy of said application, both Parts I and II, is attached to and made a part of each policy. The answers appearing in said application to the questions contained therein are the correctly recorded answers made to the respective questions by said John G. Ruhlin. Included in the questions propounded to and answers made by said John G. Ruhlin are the following:

"8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of B. The Heart, Blood Vessels or Lungs? No.

10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers? No.

[fol. 7] 11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years? None."

9. In his answers to the questions prior to No. 10 quoted in the preceding paragraph, said John G. Ruhlin named no physician or practitioner whatever and no ailment or disease, except a herniotomy in 1912 with good results.

10. Also in said application, John G. Ruhlin above his signature stated:

"On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree that the Company believing them to be true shall rely and act upon them."

11. In fact the aforesaid answers of John G. Ruhlin to questions in Part II of the applications made on November 28, 1928, and on June 26, 1930, were false. Said John G. Ruhlin had before November 28, 1928, consulted a physician or practitioner for and had suffered from an ailment or disease of the heart; had consulted a physician or practitioner for an ailment or disease not included in any of his answers and had consulted or been examined or treated by various physicians or practitioners within the five years immediately preceding November 28, 1928, and June 26, [fol. 8] 1930. From November 3, , until about 1927, said John G. Ruhlin consulted, was examined and was treated by Dr. Frank A. Lorenzo for heart trouble, aortic insufficiency, myocarditis and a decompensating heart.

12. The aforesaid questions and answers were material to the risk and if said questions had been answered truthfully the plaintiff would not have issued any of said policies. The plaintiff in approving said John G. Ruhlin's applications and issuing the aforesaid policies believed the above-quoted answers of said John G. Ruhlin to be full, complete and true and relied and acted upon them.

13. The above-quoted answers of John G. Ruhlin to questions in Part II of the applications were made by him with knowledge of their falsity and fraudulently for the purpose of securing said insurance.

14. On November 1, 1934, said John G. Ruhlin presented to the plaintiff a claim for total and permanent disability

benefits under each of said five policies. The cause for said alleged total and permanent disability is heart trouble.

15. The plaintiff did not know or have any reason to learn of said fraudulent misrepresentations by which said policies were procured from it until after said claim for disability benefits was presented on November 1, 1934, whereupon it conducted an investigation which disclosed the facts hereinbefore set forth regarding the prior medical history of said John G. Ruhlin. On December 28, 1934, the plaintiff [fol. 9] notified the defendants John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin that because of the aforesaid misrepresentations it elected to rescind the disability and double indemnity benefits provisions of each of said five policies. Also on December 28, 1934, the plaintiff tendered to said John G. Ruhlin the sum of $1,045.42, being the aggregate amount of the premiums paid for said disability and double indemnity benefits, with interest thereon from the dates of receipt to the date of said tender, and also offered to do whatever else, if anything, it ought to do for the purpose of such rescission. Said tender was refused by said John G. Ruhlin. The plaintiff has always since December 28, 1934, been ready and willing and is now ready and willing to refund all of said premiums, together with interest thereon, and simultaneously with the filing of this bill of complaint will pay into this Court said sum of $1,045.42, and offers to do whatever else, if anything, it ought in equity to do for the purpose of reforming said policies by deleting therefrom the disability and double indemnity provisions and restoring the status quo.

16. Said John G. Ruhlin is still alive. No statement of claim has been served upon the New York Life Insurance Company or its counsel in the aforesaid action at law brought against it in the Court of Common Pleas of Jefferson County, Pennsylvania, by said John G. Ruhlin, and the plaintiff herein cannot, therefore, tell what said action is for. The defendants Jennie B. Ruhlin, John B. Ruhlin, [fol. 10] William R. Ruhlin and Jean L. Ruhlin are not parties to said action in the Court of Common Pleas of Jefferson County. No opportunity, therefore, has been afforded or is likely to be afforded the plaintiff to contest its liability under the disability and double indemnity provisions of said policies, or any of them, in any action or

proceeding at law or in equity, and particularly to set up the said fraudulent misrepresentations by which it was induced to issue said policies unless this Court entertains this suit.

Wherefore your orator is without an adequate remedy at law, is in need of such relief as can be granted only by a court of equity and unless afforded equitable relief will suffer immediate and irreparable damage. Your orator, therefore, prays your Honorable Court as follows:

(1) That the defendants be required to make full, specific and direct answers to this bill of complaint.

(2) That if any of the defendants originally named herein be minors a guardian ad litem be appointed for them by this Court and such guardian be added as a party defendant.

(3) That this Court order and decree the reformation of each of the five policies of insurance mentioned in the bill of complaint by deleting and eliminating therefrom the disability and double indemnity provisions therein contained and that said disability and double indemnity provisions be declared rescinded and void.

[fol. 11] (4) That the semi-annual premiums for policy No. 10,452,365 be reduced to $184. That the quarterly premiums for policy No. 10,452,366 be reduced to $46.90 and that the semi-annual premiums for each of the three policies numbered 11,165,728, 11,165,729 and 11,165,730 be reduced to $95.88.

(5) That pending the final disposition of this bill the defendants, their attorneys, and all other persons or parties whatsoever, be enjoined from instituting or prosecuting any action or proceeding, legal or equitable, against the New York Life Insurance Company by reason of or based upon any or all of said policies of insurance, including the action of assumpsit at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania.

(6) That pending the final disposition of this bill the defendants be restrained and enjoined from assigning said policies of insurance, or any of them, or any rights thereunder, or from changing the beneficiary or any thereof.

(7) That a writ of subpœna of the United States of America be directed to the defendants and the guardian

ad litem, if one be appointed for any minor defendants, commanding them on a day certain to appear and answer this bill of complaint and abide by and perform such orders and decrees in the premises as to this Court shall seem proper and be required by the principles of equity and good conscience.

(8) That your Honorable Court grant such other and further relief not herein specifically prayed for as the na-
[fol. 12] ture of the case may require and as to it may seem meet.

New York Life Insurance Company, by William F. Rohlefs. Smith, Buchanan, Scott & Gordon, Solicitors for Plaintiff.

Duly sworn to by Wm. F. Rohlefs. Jurat omitted in printing.

[fol. 13] EXHIBIT "A" TO BILL OF COMPLAINT

New York Life Insurance Company

A Mutual Company

Agrees to Pay

to Jennie B., wife of the insured, * * * (with right on the part of the Insured to change the Beneficiary in the manner provided herein) * * * Beneficiary (the face of this policy) * * * Ten Thousand * * * Dollars upon receipt of due proof of the death of * * * John G. Ruhlin * * * the Insured, or (double the face of this policy) * * * Twenty Thousand * * * Dollars if such death resulted from accident as defined under "Double Indemnity" and subject to the provisions therein set forth.

And upon receipt of due proof that the Insured is totally and presumably permanently disabled before age 60, as defined under "Total and Permanent Disability",

The Company Agrees to Pay to the Insured * * * One Hundred * * * Dollars each month, and to waive payment of premiums, as provided therein.

This contract is made in consideration of the application therefor and of the payment in advance of the sum of $208.50, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for

the period terminating on the Twenty-eighth day of May Nineteen Hundred and Twenty-nine, and of a like sum on said date and every Six calendar months thereafter during the life of the Insured.

[fol. 14] (The above premium includes $5.20 for the Double Indemnity Benefit and $19.30 for the Disability Benefits.)

The premium paying period may be shortened by application of dividend additions and dividend deposits as provided herein.

This Policy takes effect as of the Twenty-eighth day of November Nineteen Hundred and Twenty-eight, which day is the anniversary of the Policy.

The Benefits and Provisions printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the New York Life Insurance Company has caused this contract to be signed this First day of December Nineteen Hundred and Twenty-eight.

Darwin P. Kingsley, President. Frederick M. Johnson, Secretary. ——— Registrar.

Age 42.
Examined HG.
AS EM.

Insurance Payable at Death. Premiums Payable during Life unless Dividends Applied to Shorten Premium [fol. 15] Paying Period. Disability Benefits. Double Indemnity for Fatal Accident. Annual Participation in Surplus.

Double Indemnity

The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means occurred within ninety days after such injury.

Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an as-

sault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or, directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

Double Indemnity shall not apply to the Temporary Insurance or to the Paid-up Insurance provided herein under "Surrender Values", or to any Dividend Additions provided under "Participation in Surplus—Dividends". [fol. 16] Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for the Double Indemnity Benefit.

Total and Permanent Disability

Disability shall be considered total whenever the Insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this Policy took effect and before the anniversary of the Policy on which the Insured's age at nearest birthday is sixty.

Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the Insured is totally disabled as above defined, and will be continuously so totally disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the Insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted:

(a) Waiver of Premium.—The Company will waive the payment of any premium falling due during the period of continuous total disability, the premium waived to be the annual, semi-annual or quarterly premium according to the [fol. 17] mode of payment in effect when disability occurred.

(b) Income Payments.—The Company will pay to the Insured the monthly income stated on the first page hereof ($10 per $1,000 of the face of this Policy) for each completed month from the commencement of and during the period of continuous total disability. If disability results from insanity, payment will be made to the beneficiary in lieu of the Insured.

In event of default in payment of premium after the Insured has become totally disabled as above defined, the Policy will be restored and the benefits shall be the same as if said default had not occurred, provided due proof that the Insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, is received by the Company not later than six months after said default.

The total and irrecoverable loss of the sight of both eyes or of the use of both hands or of both feet or of one hand and one foot shall constitute total disability for life.

Before making any income payment or waiving any premium, the Company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, [fol. 18] or if the Insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived.

The sum payable in any settlement of the Policy shall not be reduced by income payments made nor by premiums waived under the above provisions. Dividends, loan and surrender values shall be the same as if the waived premiums had been duly paid. Any disability benefit due but unpaid at the time of the Insured's death shall be payable to the person entitled to the proceeds of the Policy.

Disability Benefits shall not apply if the disability of the Insured shall result from self-inflicted injury or from military or naval service in time of war; nor shall these benefits apply to the Temporary Insurance or to the Paid-up Insurance provided herein under "Surrender Values", or to any Dividend Additions provided under "Participation in Surplus—Dividends".

Any premium due on or after the anniversary of the Policy on which the age of the Insured at nearest birthday is sixty, will be reduced by the amount of premium charged for Disability Benefits. Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for Disability Benefits.

Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of [fol. 19] premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits.

IN UNITED STATES DISTRICT COURT

ORDER RESTRAINING DEFENDANTS, ETC.

Now, to-wit, February 14, 1935, the Court having examined the bill of complaint filed in the above entitled case, and after due consideration and upon motion of counsel for the plaintiff, it is ordered, adjudged and decreed as follows:

1. That the plaintiff be permitted to pay into the registry of this Court the sum of $1,045.42 offered to be refunded in said bill.

2. That the defendants be and they hereby are required to answer fully, specifically and directly the averments set forth in said bill of complaint, said answers to be filed within twenty days from the date of service of said bill upon said defendants.

3. That the defendants, their heirs, executors, administrators and assigns, their attorneys and all other persons, be and they hereby are temporarily restrained from instituting any action or proceeding, legal or equitable, against the plaintiff or from proceeding in any way whatsoever with any action or suit which may have been instituted by them or any of them prior to the filing of this bill of complaint, including the action of assumpsit at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, upon or in anywise on account [fol. 20] of the policies of insurance referred to in the bill

of complaint filed in this case; or from assigning or transferring any rights under said policies or changing the beneficiary or beneficiaries thereof; and that a rule to show cause why this temporary restraining order should not be continued and a preliminary injunction of like tenor issued, be and it hereby is granted against the defendants, returnable February 23, 1935; bond to be approved by this Court to be given by the plaintiff in the sum of $1000.00.

4. That a subpœna be issued to be served upon each and all of the defendants.

Per Curiam, S.

IN UNITED STATES DISTRICT COURT

ORDER MAKING RULE ABSOLUTE

Now, to-wit, February 23, 1935, the return date of the rule heretofore granted in the above entitled case on February 14, 1935, having arrived, after due consideration and upon motion of counsel for the plaintiff, it is ordered, adjudged and decreed that said rule be and it hereby is made absolute and the defendants, John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, their heirs, executors, administrators and assigns, their attorneys and all other persons or parties whatsoever, are enjoined, pending the final determination of this suit, from instituting any action or proceeding, legal or equitable, against the plaintiff or from proceeding in any way whatsoever with any action or suit which may have been instituted [fol. 21] by them or any of them prior to the filing of the above entitled suit, including the action of assumpsit at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, upon or in anywise on account of the policies of insurance referred to in the bill of complaint filed in this case; or from assigning or transferring any rights under said policies or changing the beneficiary or beneficiaries thereof; the bond heretofore given by the plaintiff to stand pending the final determination of this suit.

Per Curiam, S.

IN UNITED STATES DISTRICT COURT

MOTION TO DISSOLVE TEMPORARY INJUNCTION—Filed March 2, 1935

And now, March 1, A. D. 1935, defendants, by their attorneys, Margiotti, Pugliese, Evans & Reid, who appear specially for the purposes of this Motion, moves the Court to dissolve the temporary injunction issued in the above stated case, and assigns therefor the following reasons:

First. Before the Bill in Equity in this case was filed, a suit involving substantially the same subject-matter was pending in the Court of Common Pleas of Jefferson County, Pennsylvania, in an action of assumpsit entered to No. 353 January Term, 1935, which said court is a court of competent, concurrent jurisdiction with this court, and which State Court has priority of jurisdiction.

[fol. 22] Second. The plaintiff in the action of assumpsit previously instituted in Jefferson County to No. 353 January Term, 1935, is John G. Ruhlin, the Insured in the contracts, copies of which are attached to the Bill of Complaint, and the other defendants above named are Jennie B. Ruhlin, wife of the Insured, and John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, children of said John G. Ruhlin, Insured, as shown in Plaintiff's Bill, said children being minors; which said wife and children as shown by the policies in suit, are all made Beneficiaries under the several policy contracts in suit in this court, and in the Court of Common Pleas of Jefferson County.

Third. This Court is without jurisdiction to grant an Injunction to stay proceedings in the said State Court, under the provisions of section 265 of the Judicial Code (28 U. S. C. A. sec. 379).

Fourth. The plaintiff has a plain, adequate and complete remedy at law.

Fifth. This Court is without jurisdiction to deprive the defendant, John G. Ruhlin, *John G. Ruhlin*, of his right to trial by jury.

Sixth. No cause for equitable relief is stated in the Bill of Complaint.

Seventh. That the policies in suit according to their respective terms are each incontestable after two years from its respective date of issue "except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

[fol. 23] Eighth. That the provisions and conditions contained in each policy respectively as to Disability Benefits, are as follows:

"Disability Benefits shall not apply if the disability shall result from self-inflicted injury or from military or naval service in time of war, or from engaging as a passenger or otherwise in aviation or aeronautics; nor shall these benefits apply to the Temporary Insurance or to the Paid-Up Insurance provided here under 'Surrender Values', or to any Dividend Additions provided under 'Participation in Surplus-Dividends'."

Ninth. That the provisions and conditions as to Double Indemnity in each of said policies, are as follows:

"Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury."

Tenth. That the only ground set up in the Bill in this case, upon which reformation of the policies in suit is asked, [fol. 24] are alleged false answers made in the application for insurance as to each respective policy.

Eleventh. That John G. Ruhlin, the Insured, became totally and permanently disabled in August, 1934.

Twelfth. That in November, 1934, John G. Ruhlin, the Insured, made application to plaintiff for Disability Benefits under the five policies of insurance in suit; that in the latter part of December, 1934, the plaintiff company refused

to pay the Disability Benefits under the said five policies in accordance with said contracts and attempted to rescind the Disability and Double Indemnity Benefits, and tendered back premiums covering Disability and Double Indemnity, which tender was refused by said John G. Ruhlin; and on the 19th day of January, 1935, the said John G. Ruhlin instituted his action of assumpsit in the Court of Common Pleas of Jefferson County to No. 353 January Term, 1935, to recover the Disability Benefits under the said five contracts in suit due and owing thereunder.

Thirteenth. That the Bill upon its face shows no ground warranting the issuance by the Court of a temporary injunction.

Margiotti, Pugliese, Evans & Reid, Attorneys for Defendants.

[fol. 25] In United States District Court

Statement of Evidence Under Equity Rule 75—Filed September 26, 1935

Be it remembered that the above entitled cause came on regularly for trial before the above Court sitting in equity on the 2nd day of March, A. D. 1935, on the Bill of Complaint, praying, inter alia, for a preliminary injunction, Rule to Show Cause, and Motion to Dissolve; Messrs. Smith, Buchanan, Scott & Gordon, by William H. Eckert, Esq., appearing as counsel for plaintiff, and Messrs. Margiotti, Pugliese, Evans & Reid, by S. C. Pugliese, Esq. and John E. Evans, Sr., Esq., appearing as counsel for defendants, d. b. e.

The Court stated that he would consider the allegations of the Bill of Complaint as the reasons urged by plaintiff for the Injunction.

Attorneys for defendants offered in evidence, and called particular attention to paragraph one of the Bill of Complaint, alleging, inter alia: "The defendant John G. Ruhlin has, however, brought an action of assumpsit against the New York Life Insurance Company at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, which is within the Western District of said Commonwealth."

The above and foregoing is all the evidence introduced at the trial of the said cause and all proceedings had in the trial thereof.

[fol. 26] Wherefore, John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, defendants and appellants, pray that the above statement of evidence be settled, approved and allowed by the above-entitled Court as a true, full, correct and complete statement of the evidence taken and given on the trial of said cause, for use on the Appeal taken to the United States Circuit Court of Appeals for the Third Circuit.

Dated September 24, A. D. 1935.

Margiotti, Pugliese, Evans & Reid, Sebastian C. Pugliese, John E. Evans, Sr., Attorneys for Defendants-Appellants.

Service of a copy of the foregoing Statement of Evidence is hereby accepted this 26th day of September, A. D. 1935.

Smith, Buchanan, Scott & Gordon, Attorneys for Plaintiff-Appellee.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING STATEMENT OF EVIDENCE

And now, September 28, A. D. 1935, the foregoing Statement of Evidence is in all respects hereby approved and settled as a true and complete statement of the evidence adduced on the trial of the above-entitled action.

F. P. Schoonmaker, United States District Judge,
Per Gibson, J.

[fol. 27] IN UNITED STATES DISTRICT COURT

OPINION—Filed April 13, 1935

On Defendants' Motion: (1) To Dismiss Bill of Complaint; (2) To Dissolve Temporary Order Relative to Further Proceedings by Defendant John G. Ruhlin Against Plaintiff in Jefferson County Court of Common Pleas

SCHOONMAKER, J.:

The plaintiff sued in equity the defendants, who are respectively the insured and beneficiaries in five insurance

policies issued by the plaintiff on the life of John G. Ruhlin, for purpose of obtaining a decree cancelling and eliminating from said policies the provisions for the payment of double indemnity and disability benefits on the ground that the policies were procured by fraud on the part of the insured. The plaintiff also obtained a temporary restraining order restraining the defendant, John G. Ruhlin, from proceeding further pending the decision of the instant suit, with an action brought by him against the plaintiff in the Court of Common Pleas of Jefferson County, Pennsylvania, to recover disability benefits alleged to have accrued on these policies.

The defendants have moved to dismiss the bill of complaint, because it discloses no ground of equitable relief and have also moved to dissolve the temporary restraining order because the court was without power to make it.

The sole question raised on the motion to dismiss was whether the policy by the terms thereof had become incontestable.

[fol. 28] The clause of all five policies as to incontestability is as follows:

"Incontestability. This policy shall be incontestable after two years from its date except for nonpayment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

This suit was brought more than two years from the date of each policy involved.

Our opinion is that under this clause the double indemnity and disability benefit provisions of these policies are still open to contest. We rule this case on our opinion filed in New York Life Insurance Company vs. Davis, 5 Fed. Supp. 316.

As to the restraining order affecting the pending suit in Jefferson County, Pennsylvania, we hold that notwithstanding Section 265 of the Judicial Code, (Tit. 28, Sec. 379, U. S. C. A.), we have jurisdiction as an incident to this suit to restrain further prosecution of that suit until a decision of the issues involved in this case. In so doing, we follow our ruling, New York Life Ins. Co. vs. Davis, supra; New York Life Ins. Co. vs. Wingerter, 2978 Equity; New York Life Ins. Co. vs. Halpern, 47 Fed. (2) 935. This view has support in decisions in other courts. See Brown vs. Pacific

Mutual Life Ins. Co., 62 Fed. (2) 711; Jefferson Standard Life Ins. Co. vs. Keeton, 292 Fed. 53.

Both motions will be denied. Orders may be submitted accordingly.

[fol. 29] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS, ETC.

Now, to-wit, April 16th, 1935, after argument by counsel and due consideration, in accordance with the opinion filed on April 13, 1935, it is ordered, adjudged and decreed that the defendants' motion to dismiss the bill of complaint and the defendants' motion to dissolve the temporary injunction be and they hereby are each overruled; that the rule heretofore granted in the above entitled cause on February 14, 1935, be and it hereby is made absolute; and that the defendants, John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, their heirs, executors, administrators and assigns, their attorneys and all other persons or parties whatsoever, be and they hereby are enjoined, pending the final determination of this suit, from instituting any action or proceeding, legal or equitable, against the plaintiff, or from proceeding in any way whatsoever with any action or suit which may have been instituted by them or any of them prior to the filing of the above entitled suit upon or in anywise on account of the policies of insurance referred to in the bill of complaint in this case, including the action of assumpsit at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, or from assigning or transferring any rights under the disability or double indemnity provisions of said policies or changing the beneficiary or beneficiaries thereof; the bond heretofore given by the plaintiff to stand pending the final determination of this suit.

Defendants to have 15 days to answer.

Per Curiam, S.

[fol. 30] Eo die, exception noted to defendants and bill sealed.

F. P. Schoonmaker, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed April 24, 1935

To the Honorable F. P. Schoonmaker, Judge of the District Court of the United States for the Western District of Pennsylvania:

John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, your petitioners, who are the defendants in the above entitled cause, pray that they may be permitted to take an appeal from the Order of Court entered in the above cause on the 16th day of April, A. D. 1935, to the United States Circuit Court of Appeals for the Third Circuit, for the reason specified in the Assignment of Errors which is filed herewith.

And your petitioners desire that said appeal shall operate as a supersedeas, and therefore pray that an Order be made fixing the amount of security which said John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this Court be suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals, and also that the time for filing an Answer to the [fol. 31] Bill of Complaint, should the same be required, be extended to fifteen days after the decision of the said Circuit Court.

Dated, April 18, A. D. 1935.

Margiotti, Pugliese, Evans & Reid, John E. Evans,
Attorneys for Defendant-Petitioner.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

The Petition of John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, defendants in the above-entitled cause, for an appeal from the Order of April 16, A. D. 1935, is hereby granted and the appeal is allowed; and upon petitioners filing a Bond in the sum of Five Hundred ($500.00) Dollars, with sufficient sureties, and conditioned as required by law, the same shall operate as a supersedeas of the Order made and entered in

the above cause, and shall suspend and stay all further proceedings in this Court until the termination of said appeal by the United States Circuit Court of Appeals; and also the time for filing an Answer to the Bill of Complaint, should the same be required, is hereby extended to fifteen days after the decision of the said Circuit Court.

Dated, April 24, A. D. 1935.

F. P. Schoonmaker, District Judge.

[fol. 32] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed April 24, 1935

And now, to-wit, this 18th day of April, A. D. 1935, come the said John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin, and Jean L. Rulin, defendants and appellants in the above-entitled cause, and file the following assignment of errors upon which they will rely in the prosecution of the Appeal herewith petitioned for in said cause from the Order of this Court entered on the 16th day of April, A. D. 1935:

1. The Court erred in granting the Order for an interlocutory injunction herein, said Order being as follows:

"Now, to-wit, April 16, 1935, after argument by counsel and due consideration, in accordance with the opinion filed on April 13, 1935, it is ordered, adjudged and decreed that the defendants' motion to dismiss the bill of complaint and the defendants' motion to dissolve the temporary injunction be and they hereby are each overruled; that the rule heretofore granted in the above entitled cause on February 14, 1935, be and it hereby is made absolute; and that the defendants, John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, their heirs, executors, administrators and assigns, their attorneys and all other persons or parties whatsoever, be and they hereby are enjoined, pending the final determination of this suit, [fol. 33] from instituting any action or proceeding, legal or equitable, against the plaintiff, or from proceeding in any way whatsoever with any action or suit which may have been instituted by them or any of them prior to the filing of the above entitled suit upon or in any wise on account of the policies of insurance referred to in the bill of complaint

in this case, including the action of assumpsit at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, or from assigning or transferring any rights under the disability or double indemnity provisions of said policies or changing the beneficiary or beneficiaries thereof; the bond heretofore given by the plaintiff to stand pending the final determination of this suit.

Per Curiam, F.

Eo die, exception noted to defendants and bill sealed.

F. P. Schoonmaker, Judge."

Wherefore, defendants and appellants pray that the said Order may be reversed, and for such other and further relief as to the Court may seem just and proper.

Margiotti, Pugliese, Evans & Reid, Attorneys for Defendants-Appellants.

[fol. 34] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed September 26, 1935

To the Clerk of the above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit, pursuant to an Appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. Docket Entries.
2. Bill of Complaint—omitting from Exhibit "A"—the policy—the following: all pages excepting the first page and page 2 "Double Indemnity" and "Total and Permanent Disability" and on Page 6 the Incontestability Clause; also omitting Exhibits "B", "C", "D" and "E".
3. Order of February 14, 1935.
4. Order of Court granting restraining Order.
5. Motion to Dissolve.
6. Statement of evidence.
7. Opinion re Motion.

8. Order re Motion.
9. Petition for Appeal and Supersedeas.
10. Order allowing Appeal and Supersedeas.
11. Assignment of Error.
12. This præcipe.
13. Clerk's Certificate.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the Circuit Court of [fol. 35] Appeals for the Third Circuit, and to be filed in the office of the Clerk of the said Circuit Court at Philadelphia, Pa.

Dated, September 26th, A. D. 1935.

Margiotti, Pugliese, Evans & Reid, Sebastian C. Pugliese, John E. Evans, Sr., Attorneys for Appellants.

Service of the above Praecipe accepted and acknowledged this 26th day of September, A. D. 1935.

Smith, Buchanan, Scott & Gordon, Attorneys for Appellee.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 36] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5939

John G. Rhulin et al., Appellants,

vs.

New York Life Insurance Co., Appellee

Order Assigning Hon. Albert L. Watson for Argument—Filed Nov. 8, 1935

Appeal from the District Court of the United States for the Western District of Pennsylvania

And now, to-wit: this 8th day of November, A. D. 1935, it is ordered that Hon. Albert L. Watson, District Judge for the Middle District of Pennsylvania, and Hon. —— ——,

District Judge for the —— District of ——, be, and he is hereby assigned to sit in above case in order to make a full court.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 37] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MINUTE ENTRY

And afterwards, to wit, the 8th day of November, 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and Honorable Albert L. Watson, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 6th day of October, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 38] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5938

THERESA M. GATTI, IN HER OWN RIGHT AND AS GUARDIAN OF THE ESTATE OF YOLANDA J. GATTI, Respondent-Appellant,

v.

NEW YORK LIFE INSURANCE COMPANY, Complainant-Appellee

OCTOBER TERM, 1935

No. 5939

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, WILLIAM R. RUHLIN and JEAN L. RUHLIN, Respondents-Appellants,

v.

NEW YORK LIFE INSURANCE COMPANY, Complainant-Appellee

Appeals from the District Court of the United States for the Western District of Pennsylvania

OPINION—Filed October 6, 1936

[fol. 39] Before Davis and Thompson, Circuit Judges, and Watson, District Judge

DAVIS, Circuit Judge.

Both cases in these appeals from the District Court involve identical questions of law.

On September 9, 1926, the New York Life Insurance Company insured the life of Yolanda J. Gatti, a citizen of Pennsylvania, for $5,000. In addition to insuring the life of Gatti, the policy contained a clause granting certain benefits in the event she became totally disabled.

She later suffered from dementia praecox, or a manic depressive psychosis, and applied for the benefits under the total disability clause. The Insurance Company paid $1,850 thereunder to the insured, or her guardian, Theresa Gatti. On November 20, 1934, after some investigation, it notified her and Theresa Gatti, that it had elected to rescind those parts of the contract of insurance which covered benefits for total disability and double indemnity, alleging that the

insured had made certain false and fraudulent misrepresentations in the application for the insurance, and tendered the amount of the premiums paid under those clauses. They refused the tender and instituted proceedings against the Insurance Company to collect further payments, which they claimed to be due, of the total disability benefits, in the Common Pleas Court of Jefferson County, Pennsylvania.

On December 1, 1928, the Insurance Company issued two like policies of insurance on the life of John G. Ruhlin, a citizen of Pennsylvania, one policy for $10,000, and the second for $5,000. On July 7, 1930, it issued three more similar policies on the life of Ruhlin, each for the face value of $4,000. All of these policies contained clauses granting [fol. 40] total disability and double indemnity benefits. On November 1, 1934, Ruhlin presented a claim for benefits for total disability. The Insurance Company refused this application, notified him that it had elected to rescind the policies in so far as they granted disability and double indemnity benefits on the ground of fraud, and tendered the amount of the premiums up to that time paid. The appellant refused the tender and also instituted suit in the Common Pleas Court of Jefferson County, Pennsylvania, to collect the benefits which he claimed to be due him under the policy.

On January 9, 1935, the Insurance Company filed a bill of complaint against Yolanda and Theresa Gatti, and on February 14, 1935, it filed a similar bill against John G. Ruhlin and the beneficiaries named in the policies. The bills contain several questions and answers made in the medical examination in connection with the applications for insurance; allege these answers to be false and fraudulent; set forth certain allegations of fact indicating wherein the answers were false and fraudulent; pray that the provisions in the policies relating to total disability and double indemnity benefits be rescinded; and that the defendants be enjoined from instituting or prosecuting any action under these provisions.

The District Court entered decrees granting preliminary injunctions and from these decrees the defendants appealed.

All the policies involved contain the following "incontestability" clause:

"This policy shall be incontestable after two years from its date of issue except for the nonpayment of premiums,

and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

The first question raised by these appeals is whether or [fol. 41] not the Insurance Company has the right, after expiration of two years from the date of the policies, to rescind the provision for double indemnity and disability benefits because of fraud practiced in procuring the insurance.

This question has never to our knowledge been decided by the United States Supreme Court, and the state and federal courts which have passed upon it are not in accord.

The United States Circuit Court of Appeals for the Fifth Circuit in the case of Pyramid Life Insurance Co. v. Selkirk, 80 Fed. (2d) 553, held that the insurer had the right to rescind for fraud the provisions relating to disability and double indemnity benefits in a contract of insurance containing an incontestability clause substantially the same as the one in the case at bar.

The United States District Court for the Western District of Pennsylvania in the case of New York Life Insurance Company v. Davis, 5 Fed. Sup. 516 reached the same conclusion. So have the state courts in the states of New York, Connecticut, Pennsylvania, Maryland, Mississippi, Arizona, Washington and Tennessee.

We are concerned here with the "provisions and conditions" relating to disability. Leaving out the parts not material here, the excepting clause reads: "This policy shall be incontestable after two years from its date of issue * * * except as to provisions and conditions relating to disability benefits". It was clearly the purpose of the Insurance Company to except the provisions creating the obligation to pay these benefits from the incontestable provisions obligating it to pay insurance on the life of the insured. The policy clearly sets out the provisions and conditions relating to disability benefits and in definite and comprehensive language the excepting clause excludes these from the incontestability provisions.

[fol. 42] But the United States Circuit Court of Appeals for the Fourth Circuit in the cases of Ness v. Mutual Life Insurance Company of New York, 70 Fed. (2d) 59 and New York Life Insurance Company v. Truesdale, 79 Fed. (2d) 481, and the Circuit Court of Appeals for the Ninth Circuit in the cases of Mutual Life Insurance Co. of New York v. Markowitz, 78 Fed. (2d) 396 and New York Life In-

surance Company v. Kaufman, 78 Fed. (2d) 398 together with one or two state courts have reached a contrary conclusion. They hold that the exception in the incontestability clause applies to the "*provisions and conditions*" relating to disability and double indemnity benefits and not to the benefits themselves. For this reason, they say, the insurance company may not defend against a claim for disability benefits on the ground of fraud practiced in the procurement of the insurance if the period of limitation has expired.

We think this construction is untenable for two reasons: 1. The company may always, without an exception in the incontestability clause, contest the question as to whether or not a particular claim is covered by the policy. The question is purely one of coverage. That is, whether or not the insured has complied with the particular provisions or conditions entitling him to benefits. Metropolitan Life Assurance Co. v. Conway, 252 N. Y. 449; Smith v. Equitable Life Assurance Society, 89 S. W. (2d) (Tenn.) 165. 2. The exception here does not intend to distinguish between the "provisions and conditions" relating to benefits and the benefits themselves. These terms, "provisions and conditions", are comprehensive of the subject to which they relate. Smith v. Equitable Life Assurance Society, supra. The expression "provisions and conditions relating to disability benefits" even if tautological, embraces all matters [fol. 43] relating to liability for such benefits. When these terms are combined nothing else relating to liability for disability benefits remains for consideration. Both are excepted from the operation of the incontestability clause. Pyramid Life Insurance Co. v. Selkirk, supra. The language is clear and definite and the parties perfectly well understood it or with ordinary intelligence should have understood it. The exception is stated in such language as not to permit a person deliberately to misrepresent the facts and practice fraud on the company for his personal advantage and then hide behind a refined construction of the language employed.

The final question involved in these cases is whether or not the District Court erred in enjoining the prosecution of the cases in the State Court under these policies in view of the fact that in each case the insured had instituted proceedings in the State Court prior to the time when the appellee filed the bills of complaint for cancellation.

The appellants rely upon section 265 of the Judicial Code (28 U. S. C. A. section 379) which reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by law relating to proceedings in bankruptcy."

Where there is a conflict of jurisdiction between state and federal courts, there are two rules of law, the application of which depends upon whether the suit is in personam or in rem. Where the judgment sought is strictly in personam, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state and federal court may proceed with the litigation, at least, until [fol. 44] judgment is obtained in one court and this may be set up as res judicata in the other court. Ward v. Foulkrod, 264 Fed. 627; Buck v. Colbath, 70 U. S. 334, 340; Kline v. Burke Construction Co., 260 U. S. 226; Penn Co. v. Pennsylvania, 294 U. S. 189, 195. But if the two suits are in rem, requiring that the court have possession or control of the res, which is the subject of the suit, in order to proceed with the cause and grant relief, the court first acquiring jurisdiction over the property may maintain and exercise it to the exclusion of the other to the end of the suit. Ward v. Foulkrod, supra; Penn Co. v. Pennsylvania, supra.

These cases were proceedings purely in personam and were instituted first in the State Court. They could have proceeded in both the state and federal courts at the same time and in whichever court judgment was first obtained, this could have been set up as res judicata in the other court. In such a situation the federal court has no right to restrain action in the State Court.

But it is urged that there are exceptions to the above rules, one of which is that the remedy at law afforded by the State Court is inadequate for the reason that the judgment secured there would not be binding upon the beneficiaries named in the policies or that the issue might be disposed of upon some ground other than the fraud set up in the case in equity in the federal court.

The Insurance Company could have defended the action at law in the State Court on the ground of fraud prac-

ticed in procuring the policy. Enelow v. New York Life Insurance Company, 293 U. S. 379. In that suit it could have called all its witnesses to establish the fraud. If the beneficiaries should ever bring suit against the company on the policies, it could call the same witnesses to testify again and if they had died in the meantime their previous testimony could be used.

[fol. 45] As to the disposition of the cases on some other ground than fraud, this apprehension could be avoided by requesting special verdicts so that the question of fraud could be determined.

The Insurance Company had a complete remedy at law against liability for disability benefits and should have pursued it in the State Court. Enelow v. New York Life Insurance Co. supra. The principles and considerations which should control a federal court of equity in refusing to assume jurisdiction over the statutory administration of corporate assets by state officers were recently stated and discussed by Mr. Justice Stone in the cases of Pennsylvania v. Williams, 294 U. S. 176; Penn Co. v. Pennsylvania, 294 U. S. 189; Gordon v. Washington, 295 U. S. 30. The reasoning and logic in those cases seem applicable here.

The District Court had jurisdiction to sustain a suit for the cancellation of the provision for double indemnity, which was not involved in the cases in the State Court, but the reasoning in the above cases raises a serious question as to whether or not, under the circumstances of the cases at bar, it should have exercised its right of jurisdiction. No court, however, has gone so far as to deny jurisdiction under similar circumstances. Accordingly it may proceed to hear the cases for cancellation of the policies in so far as they provide for double indemnity benefits, but not as to disability benefits, the liability for which the Insurance Company has a complete remedy at law in the State Court.

That part of the decrees of the District Court, in which it refused to dismiss the bills of complaint in so far as they seek the cancellation of the provisions of the policies for double indemnity benefits, is affirmed, but the remaining parts of the decrees are reversed with directions to dismiss [fol. 46] the bills in so far as they seek the cancellation of the provisions of the policies for disability benefits, and to

vacate the order restraining the appellants from prosecuting the actions brought by them in the State Court.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 47] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5939

John G. Ruhlin et al., Appellants,

vs.

New York Life Insurance Co., Appellee

Judgment—Filed October 6, 1936

Appeal from the District Court of the United States, for the Western District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed as to that part of said decree which refused to dismiss the bill of complaint in so far as it seeks the cancellation of the provisions of the policy for double indemnity; but reversed, with costs, as to the remaining parts of said decree, with directions to the said District Court to dismiss the bill in so far as it seeks the cancellation of the provisions of the policy for disability benefits, and to vacate the order restraining appellants from prosecuting the action brought by them in the State Court.

J. Warren Davis, Circuit Judge.

Philadelphia, October 6, 1936.

[File endorsement omitted.]

[fol. 48] [File endorsement omitted]

[fol. 48-1] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed October 31, 1936

To the Honorable, the Judges of said Court:

Your petitioner, the New York Life Insurance Company, the appellee in the above entitled case, respectfully prays a rehearing of the appeal on the question whether equity has jurisdiction to rescind the disability provisions of the policies of insurance involved in this litigation. The reasons for this petition follow.

The action at law brought by the insured alone, and to which the beneficiaries are not parties, we respectfully submit, does not afford a plain, adequate and complete [fol. 48-2] remedy at law. If the proposition just stated is correct, then it clearly follows that equity has jurisdiction and that the equity court should restrain the further prosecution of the action at law. It is entirely immaterial that the action at law may be in a state court and the suit in equity in a federal court. As said by Judge Parker for the Circuit Court of Appeals for the Fourth Circuit in Brown v. Pacific Mut. Life Ins. Co., 62 F. (2d) 711, 713, the real question in such a case as this is not one of conflict between state and federal jurisdictions, but concerns the respective jurisdictions of law and equity.

The first reason set forth in the appellee's original brief in this case (pp. 8-22), to show that the action at law brought by John G. Ruhlin alone in the state court does not furnish an adequate remedy to the appellee, is that a judgment favorable to the company in that law action would not be res adjudicata of a claim presented by the beneficiaries if the insured had died or become insane. In its opinion in this case filed on October 6, 1936, this Court does not disagree with the proposition that a judgment in the law action for disability benefits would not be res adjudicata against the beneficiaries. Instead, this Court said (p. 7):

"If the beneficiaries should ever bring suit against the company on the policies, it could call the same witnesses to

testify again and if they had died in the meantime their previous testimony could be used."

With all due deference for the learning and ability of this Court, it is respectfully submitted that the above quoted [fol. 48-3] reasoning is incorrect. In the first place, we submit that if the witnesses to prove that the insurance had been obtained by fraud, had died before the beneficiaries brought an action upon the policies, their previous testimony in the action brought by the insured alone, and to which the beneficiaries were not parties, could not be used. The beneficiaries, it should be remembered, are not parties to the action at law already brought by John G. Ruhlin alone (R. 9-10). Nor is there any such privity existing between the insured and the beneficiary in a life insurance policy as would result in the beneficiary being bound by testimony in a suit to which the beneficiary was not a party. The cases cited in the appellee's original brief in this case (pp. 8-19), for the conclusion that the judgment in a case to which the beneficiaries were not parties would not be res adjudicata against them, also support the proposition that the rights of the beneficiaries could not be prejudiced by the testimony of third persons in a suit to which the beneficiaries were not parties. It is well established that testimony in one case cannot be admitted in another case against persons who were neither parties to the prior suit nor in privity with a party to such earlier suit: Fresh v. Gilson, 16 Pet. 327, 331-332; Rutherford v. Geddes, 4 Wall. 220, 224; Tappan v. Beardsley, 10 Wall. 427, 434-435; Rumford Chemical Works v. Hygienic Chemical Co., 215 U. S. 156, 159-160; McCully v. Barr, 17 S. & R. 445, 450-451; Norris v. Monen, 3 Watts 465, 470.

[fol. 48-4] In the second place, even if the witnesses to prove the fraud were still alive and available when the beneficiaries brought suit, so that the insurer "could call the same witnesses to testify again," nevertheless a multiplicity of suits would result. There would be at least two actions at law: one by the insured, and the other by the beneficiaries, both involving the same question. In equity, on the contrary, a single suit will adjudicate the rights of all parties. The avoidance of a multiplicity of suits is of itself a recognized basis for equity jurisdiction: Oelrichs v. Spain, 15 Wall. 211, 228; Donovan v. Penna. Co., 199 U. S. 279, 305; Mutual Life Ins. Co. v. Blair, 130 Fed. 971, 977; 1 Pomeroy's

Equity Jurisprudence (4th ed.) § 243 et seq.; Simkins Federal Practice § 381.

Furthermore, even if the witnesses by whom the fraud could now be proved are still alive, and their whereabouts known, when in the perhaps distant future the beneficiaries bring suit upon the policies, it may be that the passage of years will have resulted in those witnesses having lost their records and recollection of the material facts. The evidence to prove that a fraud was committed in the obtaining of life insurance consists chiefly of the testimony of doctors that they treated the insured for a material illness before the insurance was applied for. The question of dates is vital—whether the illness and treatments occurred before or after the application for the insurance. But dates are difficult to remember. It is very likely, therefore, that before the beneficiaries can bring suit on a policy on the life of a living [fol. 48-5] person, the lapse of time will so have dimmed the memories of the doctors and other witnesses that to prove the fraud then will be impossible. This consideration is also sufficient to give equity jurisdiction (see authorities cited in the appellee's original brief in this case, p. 17).

This Court in its opinion filed on October 6, 1936, next said (p. 8) that any apprehension over disposition of the action at law brought by the *in*insured alone on some other ground than fraud "could be avoided by requesting special verdicts." The action at law in this case, as well as in the companion case of Gatti v. New York Life Ins. Co. (No. 5938), is pending in a state court of Pennsylvania. In Pennsylvania a litigant does not have an absolute right to a special verdict. Whether the jury shall be asked to return a special verdict lies "wholly within the discretion of the trial judge": Duffy v. York Haven W. & P. Co., 242 Pa. 146, 152. And even though the trial judge requests the jury to return a special verdict, the jury may ignore the request; the jury cannot be compelled to return a special verdict: Chambers v. Davis, 3 Whart. 40, 47; Patterson v. Kountz, 63 Pa. 246, 252; Culver v. Lehigh Valley Transit Co., 322 Pa. 503, 510-511. To the same effect, see 6 Standard Pa. Practice, § 67 (pp. 223-224). There is doubt, therefore, whether a decision upon the question of fraud in the procurement of the insurance could be obtained in the action at law brought by the insured alone for disability benefits. "It is a settled principle of equity jurisprudence that,

if the remedy at law be doubtful, a court of equity will not [fol. 48–6] decline cognizance of the suit. Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law": Davis v. Wakelee, 156 U. S. 680, 688; Union Pac. R. R. Co. v. Weld Co., 247 U. S. 282, 285-286. This principle was specifically applied to a suit by an insurer to rescind a life insurance policy because of fraud in the application by the Circuit Court of Appeals for the Eighth Circuit in Lincoln Nat. Life Ins. Co. v. Hammer, 41 F. (2d) 12, 16. This principle was also invoked in Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 296.

For the conclusion that the appellee had a complete remedy at law against liability for disability benefits in the action of assumpsit brought by John G. Ruhlin alone in the state court, this Court cited Enelow v. New York Life Ins. Co., 293 U. S. 379. That case, however, is decisively different from the instant one. There the insured was dead; here he is still alive (R. 9). The action in the Enelow case was brought by the beneficiary to recover on the ordinary life feature of the policy. Mrs. Enelow, the plaintiff in that case, was therefore the only party who had any possible interest in the insurance and the only one who had or could have any claim under the policy. In the case at bar, on the contrary, the beneficiaries are not parties to the action at law (R. 9-10). The insured, John G. Ruhlin, the only plaintiff in the action at law in Jefferson County, is not the only person who has an interest in the policies in controversy nor the only one who may have a claim under said policies. The beneficiaries designated in the policies have an interest [fol. 48–7] therein and may have claims for disability benefits or double indemnity thereunder (R. 13, 17-18). If the action at law brought by Mrs. Enelow terminated in favor of the company, there clearly could be no subsequent suit; the company's liability under the policy would have been adjudicated once and forever. In the case at bar, however, no similar conclusive end would be put to the question of liability of the company under the policies by a decision in the action at law brought by the insured alone for disability benefits. Though that action at law were terminated in favor of the insurer, and a special verdict rendered finding that the insurance had been obtained by fraud, another suit could subsequently be brought by the beneficiaries for dou-

ble indemnity or disability benefits. In that subsequent suit, as has already been shown, the judgment in the action at law to which the beneficiaries were not parties could not be invoked under the doctrine of res adjudicata. The Enelow case, therefore, it is respectfully submitted, does not rule the one at bar. Indeed, the learned counsel for the petitioner in the Enelow case conceded in his brief filed with the Supreme Court that equity had jurisdiction to entertain a bill filed by an insurer to cancel a policy if the insured alone had brought an action at law for disability benefits. The following is quoted from the "Petitioner's Brief" in the Enelow case (p. 20):

"And even if a suit to recover on a policy was brought within the contestable period, *if all of the parties having an interest in the policy were not included as plaintiffs,* a [fol. 48–8] judgment that the policy was obtained by fraud would not be binding against the absent parties. Insurance companies were, therefore, permitted in such exceptional cases to maintain bills to cancel policies, notwithstanding the institution of the prior action at law against them."

The cases of Pennsylvania v. Williams, 294 U. S. 176; Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, and Gordon v. Washington, 295 U. S. 30, cited in the opinion of this Court, are very different from the case at bar. Those cases involved the liquidation of insolvent building and loan, insurance and banking corporations. In those cases it was held that the federal equity court had jurisdiction, but that as a matter of sound discretion the federal court should have permitted liquidation of the insolvent corporations' assets under the specialized and detailed machinery set up for that precise purpose by the Pennsylvania legislature. There is nothing in any of those cases which even intimates that equity does not have jurisdiction in a situation such as is presented by the case at bar.

"It is not enough, that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity." Boyce v. Grundy, 3 Pet. 210, 215.

In the case at bar the action at law brought by John G. Ruhlin alone for disability benefits in the state court does

not afford a remedy that is plain or adequate or as practical and efficient or as prompt as the remedy in equity. The [fol. 48–9] bill filed by the appellee should, therefore, be retained in so far as it seeks cancellation of the provisions of the policies for disability benefits, as well as in so far as it seeks cancellation of the provisions for double indemnity benefits. To this end, a rehearing is respectfully prayed.

Respectfully submitted, William H. Eckert, Smith, Buchanan, Scott & Gordon, Attorneys for Petitioner.

I hereby certify the foregoing petition has been prepared at the request of the New York Life Insurance Company, the appellee herein, and that I believe it to be well founded in law and fact, and that it is not interposed for the purpose of delay.

William H. Eckert, Of Counsel.

[fol. 49] In United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Order Granting Reargument in Part—Filed February 1, 1937

This case is here on petition for re-argument. The petition is denied as to the question of whether or not the insurance company had the right, after the expiration of two years from the date of the policy, to rescind the provision for double indemnity and disability benefits because of fraud practiced in procuring the insurance; but it is allowed as to the question of whether or not the District Court erred in enjoining the prosecution of the case in the State Court under the circumstances.

J. Warren Davis, Circuit Judge.

February 1, 1937.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MOTION FOR REARGUMENT AND RE-CONSIDERATION OF THE OPINION AND DECISION OF THE COURT FILED OCTOBER 6, 1936—Filed March 30, 1937

Whereas, we understand that the same questions involved in the appeal in this case are also involved in the case of Mutual Life Insurance Company of New York v. Stroehmann, on which latter case the certiorari was allowed, and the same was argued before the Supreme Court of the United States; and

Whereas, the Supreme Court of the United States, on March 29, 1937, handed down its Opinion and decision sustaining, as we understand, the position and contention of the appellants in this case;

Now, March 30, 1937, John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin, and Jean L. Ruhlin, Appellants, by their Counsel, John E. Evans, Sr., respect-[fol. 51] fully moves the Court for a re-argument and re-consideration of the decision of the Court in the above-stated case, filed on October 6, 1936, to the end that justice may be done between the parties to this suit.

John E. Evans, Sr., Attorney for the Appellants.

[File endorsement omitted.]

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MINUTE ENTRY

And afterwards, to wit, the 30th day of March, 1937, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in

the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 27th day of September, 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 53] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1937

No. 5939

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, WILLIAM R. RUHLIN and JEAN L. RUHLIN, Appellants,

v.

NEW YORK LIFE INSURANCE COMPANY, Appellee

Appeal from the United States District Court for the Western District of Pennsylvania

OPINION ON REARGUMENT—Filed September 27, 1937

Before Buffington, Davis and Thompson, Circuit Judges.

DAVIS, Circuit Judge:

This case is before us on reargument.

This is a suit by the appellee to rescind the double indemnity and disability provisions in certain policies of life insurance issued by it to John G. Ruhlin, one of the appellants, because of fraud alleged to have been practised by him in procuring the insurance, and to enjoin him from prosecuting a suit previously commenced by him in a state court to collect the disability benefits.

[fol. 54] The questions in issue are whether or not the company is barred from rescinding these provisions because of the "incontestability" clause contained in each of the policies and whether or not the insured should be enjoined from prosecuting the suit in the state court. This clause reads as follows:

"This policy shall be incontestable after two years from its date of issue except for the non-payment of premiums, and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

In our former opinion, filed October 6, 1936, disposing of this case and also the case of Gatti v. New York Life Insurance Company, which involved the same questions as are here in issue, we held that the company was not barred by the incontestability clause from rescinding the Disability and Double Indemnity provisions, though the action was commenced more than two years after the policy was issued and that the District Court erred in enjoining the prosecution of the suit in the state court.

In the recent decision in the case of Stroehmann et al. v. Mutual Life Ins. Co. of New York, 300 U. S. 435, the Supreme Court held that the incontestability clause there involved did bar an action to rescind the double indemnity and disability provisions after the period of contestability had passed because it was ambiguous. The clause in that case read as follows:

"Incontestability. Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively, this Policy shall be incontestable after one year from its date of issue unless the insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

[fol. 55] In its opinion the Supreme Court said:

"The Circuit Court of Appeals followed its earlier opinion in New York Life Ins. Co. v. Gatti (Oct. 6, 1936), where the company employed different language. Certain life companies undertake to make exceptions to the incontestability clause by words more precise than those now under consideration, and opinions in cases arising upon their policies must be appraised accordingly.

"Without difficulty respondent could have expressed in plain words the exception for which it now contends. It has failed, we think, so to do. And applying the settled rule, the insured is entitled to the benefit of the resulting doubt."

The "language" employed in the incontestability clause here involved is the same as that used in the Gatti case, but, as the Supreme Court pointed out, differs from that used in the Stroehmann case. The language used in the clause here in question is "more precise" than that em-

ployed in the Stroehmann case and "expresses in plain words the exception for which" the company now contends. Furthermore, both the Court of Appeals of New York and the Supreme Court of Pennsylvania have held that the incontestability clause here involved clearly excepts the double indemnity and disability provisions from its operation. Steinberg v. New York Life Ins. Co., 263 N. Y. 45, 188 N. E. 15; Manhattan Life Insurance Co. v. Schwartz, 9 N. E. (2) 16; Grise v. New York Life Ins. Co., 191 Atl. 626. We have read the recent opinion of the Supreme Court of California in the case of Coodley v. New York Life Insurance Co., — Cal. —, and the opinion of Judge Coughlin in the case of New York Life Insurance Co. v. Thomas, 27 D. & C. 215, but are not persuaded that the learned District Judge erred. Since the company is domiciled in New York and the insured lives in Pennsylvania and "all that is here [fol. 56] for our consideration is the meaning, the tacit implications, of a particular set of words", "for the sake of harmony and to avoid confusion" we shall follow the decision of those courts and hold that the insurance company is not barred by the incontestability clause from rescinding the double indemnity and disability provisions. Mutual Life Ins. Co. v. Johnson, 293 U. S. 340; Trainor v. Ætna Casualty Company, 290 U. S. 47, 54.

The second question raised is whether or not the company was entitled to an order restraining the insured from further prosecuting his action in the state court to collect disability benefits.

The company contends that its remedy at law is inadequate and that the insured should therefore be enjoined from further prosecuting his suit in the state court, for the reasons that the insured could discontinue his action at law at any time, and refuse to bring another action on the policy until all opportunity to prove fraud against him had gone; that the suit in the state court might possibly end in a general verdict in its favor, which would not settle the issue of fraud for such verdict might be based alone on the issue of disability; and that even if the issue of fraud were decided in its favor, that would not bind the beneficiaries who are not parties to the action and might at some future time sue on the policies.

It is true that the company could defend at law in the state court on the ground of fraud (Enelow v. New York

Life Ins. Co., 293 U. S. 379; Adamos v. New York Life Ins. Co., 293 U. S. 386) but whether or not the trial judge would request the jury to return a special verdict on the issue of fraud, is within his discretion (Duffy et al. v. York Haven Water & Power Co., 242 Pa. 146, 88 Atl. 935) and if requested to return such verdict, the jury could and might refuse to do so. Culver et al. v. Lehigh Valley Transit Co., [fol. 57] 322 Pa. 503, 186 Atl. 70. If, however, the judge and jury did as requested, that would not cancel the policy which the company seeks to do in the suit in equity.

When the remedy at law is not plain, adequate and complete, an insurance company does not have to await the determination of the issue of fraud at law, but may proceed in equity for the cancellation of the policy. Where there is danger that witnesses may disappear, evidence be lost, or all the parties interested in the policy are not before the court in the suit at law, or where the adequacy of the remedy at law depends upon the will of the insured, or where the ends of justice will not be satisfied by a mere judgment for the defendant in the action at law, but would require some distinctively equitable relief, such as cancellation or reformation of the instrument sued upon, equity will enjoin the action at law and proceed to give full relief. American Life Insurance Co. v. Stewart, 300 U. S. 203; Brown et al. v. Pacific Mutual Life Insurance Co., 62 Fed. (2d) 711; New York Life Insurance Co. v. Halpern, 47 Fed. (2d) 935; New York Life Insurance Co. v. Davis, 5 Fed. Supp. 316; Pomeroy on Equity Jurisprudence (4th Ed.) Vol. 4, Ch. 1363. The case of American Life Insurance Co. v. Stewart, supra, disposes of practically every argument made in the case at bar, relating to the adequacy of the remedy at law, adversely to the contention of the appellants.

In the present case the remedy at law is inadequate for the insured might discontinue his suit in the state court and even if he did not, the beneficiaries, not being parties, would not be bound by any judgment there entered. In either case, before a new action was brought by the insured or before an action was brought to which the beneficiaries could be made parties, the insurance company's witnesses might die, disappear or forget the facts relevant to the [fol. 58] alleged fraud. Furthermore, a judgment in the state court would not effect a rescission of the provisions

involved and this affirmative relief is the object of the company's suit in equity.

It follows that the decree of the District Court must be affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 59] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1937

No. 5939

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, WILLIAM R. RUHLIN and JEAN L. RUHLIN, Appellants,

vs.

NEW YORK LIFE INSURANCE CO., Appellee

JUDGMENT—Filed September 27, 1937

Appeal from the District Court of the United States, for the Western District of Pennsylvania

Thus cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, September 27, 1937.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 60] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 61] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 3, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 596

NEW YORK LIFE INSURANCE COMPANY,

vs.

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, *et al.*, Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CHARLES J. MARGIOTTI,
720 Grant Building,
Pittsburgh, Pa.

CHARLES H. SACHS,
1124 Frick Building,
Pittsburgh, Pa.

Attorneys for Petitioners.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
JOSIAH SMITH CO., PENNSYLVANIA REPRESENTATIVE,
704 SECOND AVENUE, PITTSBURGH, PA.

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SUBJECT INDEX.

CASES CITED.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles E. Hughes, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

John G. Ruhlin, Jennie B. Ruhlin, John B. Ruhlin, William R. Ruhlin and Jean L. Ruhlin, the above named petitioners, respectfully pray that a writ of certiorari issue to review the decree (R. 39) of the United States Circuit Court of Appeals for the Third Circuit entered on September 27, 1937, affirming the order (R. 19) of the United States District Court for the Western District of Pennsylvania, dated April 16, 1935, and made by Judge Schoonmaker, overruling petitioners' motion to dismiss the bill in equity instituted on February 14, 1935, in said District Court by respondent (R. 2), praying for the deletion and elimination of the disability and double indemnity provisions contained in five life insurance policies issued by respondent to John G. Ruhlin, one of the petitioners; and, pending the final disposition of said bill, that petitioners be enjoined from instituting any action, legal or equitable, against respondent, or from proceeding in any way whatsoever with any action which may have been instituted by petitioners, or any of them, prior to the filing of said bill or in any wise on account of said policies, including the action of assumpsit brought by petitioner John G. Ruhlin, hereinafter referred to as insured, against respondent at No. 353 January Term, 1935, in the Court of Common Pleas of Jefferson County, Pennsylvania, or from assigning or transferring any rights under said dis-

ability or double indemnity provisions or changing the beneficiaries thereof, and overruling, also, the motion to dissolve the temporary injunction granted in accordance with the prayers of said bill, and enjoining petitioners, pending final determination of said bill, according to the prayers of said bill.

Statement

Prior to February 14, 1935, John G. Ruhlin, the insured, brought an action at law against respondent in the Court of Common Pleas of Jefferson County, Pennsylvania, to recover certain monthly income payments, hereinafter referred to as disability payments, equal to $10 per $1,000 of the face of five policies of life insurance issued by respondent to the insured and under the terms of which respondent agreed to pay to insured said benefits upon receipt of due proof that the insured is totally and presumably permanently disabled before age 60, as defined under "Total and Permanent Disability" in said policies which were issued on the following dates:

No. 10,452,365,	December 1, 1928,	face amount	$10,000
No. 10,452,366,	December 1, 1928,	face amount	5,000
No. 11,165,728,	July 7, 1930,	face amount	4,000
No. 11,165,729,	July 7, 1930,	face amount	4,000
No. 11,165,730,	July 7, 1930,	face amount	4,000

(R. 2-4)

Each of the policies contained the following incontestable clause:

> "Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

On February 14, 1935 respondent caused said bill in equity to be filed reciting the institution of said action at law to recover said disability benefits, the issuance of said policies, that they had been obtained by means of false and fraudulent answers to questions contained in the applications for said policies and prayed for the reformation of said policies by eliminating and rescinding the disability and double indemnity provisions from said policies and for an injunction restraining the insured and the beneficiaries named therein, the other petitioners herein, from instituting any action on said policies including said action at law, pending at the time of the filing of the bill (R. 2).

Upon presentation of the bill the court issued a restraining order and granted a rule to show cause why a temporary injunction should not be granted (R. 12).

On March 2, 1935, petitioners filed motions to dismiss the bill of complaint and to dissolve the temporary injunction (R. 14).

On April 16, 1935, the court made an order overruling petitioners' motions to dismiss the bill and to dissolve the temporary injunction and enjoining petioners from instituting any actions against respondent and from proceeding with said action instituted in the state court and noted an exception to petitioners (R. 19).

On October 6, 1936, the Circuit Court of Appeals (consisting of Circuit Judges Davis and Thompson and District Judge Watson) filed an opinion affirming that part of the decree of the District Court which

refused to dismiss the bill insofar as it sought the cancellation of the disability benefit provisions, and vacated the order restraining petitioners from prosecuting the action brought in the state court (R. 25).

On September 27, 1937, the Circuit Court of Appeals (consisting of Circuit Judges Buffington, Davis and Thompson), after a reargument, rescinded the previous decree of the Circuit Court of Appeals and affirmed the decree of the District Court (R. 39).

The Questions Presented.

1. The policies involved in this suit contain the following clause:

> "Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

The provisions and conditions relative to "Disability and Double Indemnity Benefits" in said policies provide they shall be payable upon receipt of proof, and, as relates to double indemnity, that the benefits shall be payable only if death resulted in a particular manner and not if it resulted from self destruction, etc., etc., and, as relates to disability benefits, that they shall be payable only if the insured is through injury or disease wholly prevented from performing any work etc. for remuneration or profit, and then only if such disability occurs before the insured reaches a certain age; that they shall not apply if the disability resulted from self inflicted injury or from military or naval service in time of war, or to the temporary or paid up insurance provided under "Surrender Values," etc., etc.; that due proof of the continuance of the disability may be demanded from time to time

but, under certain circumstances, not more than once a year. There is no mention in these "provisions or conditions" that the sums promised are not recoverable in case of false answers in the application or anything to indicate that they stand upon a different footing from the other obligations of the insurer in the policy in regard to defenses for alleged fraud in the procurement of the contract.

Is an intent clearly shown to except disability benefits from the incontestable clause where it merely provides that "except as to provisions and conditions relating to Disability and Double Indemnity Benefits," the policy shall be incontestable after two years from its date of issue?

2. If there is a diversity of opinion among courts which have considered the identical incontestable clause as to its meaning or effect is there not such uncertainty or doubt as to call for the application of the settled rule that the insured is entitled to the benefit of the resulting doubt?

CHARLES J. MARGIOTTI,

CHARLES H. SACHS,
Counsel for Petitioners.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A.

This Court has ruled that in case of ambiguity in the provisions of a life insurance policy, that construction will be adopted which is most favorable to the assured because the language employed is that of the in-

surer; that it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it. The policy as a whole, that is, the incontestable clause and the "provisions and conditions relating to disability and double indemnity benefits" are drawn in such fashion as to lead the average man to believe that what the company reserved the right to contest is whether a man who claims to be wholly and permanently disabled and unable to perform any work or engage in business is so disabled, or whether such disability commenced before he was of a certain age and not thereafter, or to raise other questions as to whether the insured or the beneficiary has qualified to receive these payments under the many provisions and conditions which hedge disability and double indemnity benefits, but not that distinctions are to be made between the death benefits and disability and double indemnity benefits, as regards the validity of the contract.

If the insurance company intended to take away the security of attack from claims of alleged false answers in the application in the one case and not in the other, it was very easy for them to draw the contract in such a way as to clearly specify this.

B.

The decision in this case by the Circuit Court of Appeals for the Third Circuit is in irreconcilable conflict with the decisions of the United States Circuit Court of Appeals for the Ninth Circuit in the cases of New York Life Insurance Company vs. Kaufman, 78 F. (2d) 398, (cert. den. 296 U. S. 626), Mutual Life Ins. Co. vs. Markowitz, 78 F. (2d) 396, (cert. den. 296 U. S. 625), and of the United States Circuit Court of

Appeals for the Fourth Circuit in the cases of New York Life Insurance Company vs. Truesdale, 79 F. (2d) 481, and Ness vs. Mutual Life Ins. Co., 70 F. (2d) 59. It is also in conflict with the decision of this Court in Stroehmann vs. Mutual Life Ins. Co., 300 U. S. 435, 81 L. Ed. 502.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Third Circuit, should be granted.

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, WILLIAM R. RUHLIN and JEAN L. RUHLIN,
By

CHARLES J. MARGIOTTI,

CHARLES H. SACHS,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS BELOW.

The opinion of the District Court is not reported but is found at page 19 of the Record. The opinions of the Circuit Court of Appeals are not reported and are found at pages 25 and 39 of the Record.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on September 27, 1937. (R. 43.) Jurisdiction

to issue the writ is found in the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 section 1, (43 Stat. 938, 28 U. S. C. A. section 347, p. 359).

III.

Statement of the Case.

The principal facts are stated in the foregoing petition.

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in not reversing the order of the District Court, dated April 16, 1935. (R. 19.)

2. The Circuit Court of Appeals erred in affirming the decree of the District Court dated April 16, 1935. (R. 19.)

3. The Circuit Court of Appeals erred in holding that the expiration of the period reserved for contests in the incontestable clauses in the policies did not preclude the respondents from contesting the validity of the double indemnity and disability insurance contained therein on the ground of alleged fraud in the procurement thereof.

4. The Circuit Court of Appeals erred in not holding that after the expiration of the period reserved for contests in the incontestable clauses in the policies the respondent was precluded from contesting the validity of the double indemnity and disability insurance contained therein on the ground of alleged fraud in the procurement thereof.

V.

ARGUMENT.

In New York Life Ins. Co. vs. Kaufman, 78 F. (2d) 398, (C. C. A. 9th cert. denied 296 U. S. 626), the Court having before it an identical incontestable clause, so far as disability benefits are concerned, in a policy gotten up like the ones involved here, said: "The ordinary man reading the clause would believe the provisions referred to were those included in the word 'Policy' at the beginning of the clause and not to the provisions in the application which is not mentioned" (p. 404), and held that it precluded a contest of the disability insurance for fraud in its procurement after the expiration of the period reserved in the policy for contest.

This Court, in Stroehmann vs. Mutual Life Ins. Co., 300 U. S. 435, 81 Law Ed. 502, where a substantially similar incontestable clause was involved, held that no intent was shown to except disability benefits from the clause. The two clauses are as follows:

Stroehmann Case:

"Incontestability,—Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively, this Policy shall be incontestable after one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

This case:

"Incontestability.—This policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

(In the Kaufman case, *supra*, the words "and Double Indemnity" were omitted. Otherwise, the clauses are identical.)

Before the Stroehmann case was decided by this Court, a similar incontestable clause was held to preclude and debar the insurance company in its action to have the policy rescinded from raising the issue of fraud in the procurement of the policy, in Ness vs. Mutual Life Insurance Company, 70 F. (2d) 59, (C. C. A. 4th Cir.). No application was made to this Court for a writ of certiorari. See also New York Life Ins. Co. vs. Truesdale, 79 F. (2d) 481 decided by the same circuit court.

In Mutual Life Insurance Co. of N. Y. vs. Markowitz, 78 F. (2d) 396, (C. C. A. 9th cert. denied 296 U. S. 626), the Court reached a similar conclusion on a clause which was identical with the one in the Ness case.

The California Supreme Court, in Coodley vs. New York Life Ins. Co., 70 Pac. (2d) 602, found the "great weight of authority supports the position of the respondent", the insured, and affirmed the judgment of the lower court denying the right of the insurer to contest the policy and rescind the disability portion thereof on account of alleged false answers in the application. The court, in its opinion, referred to Mutual Life Ins. Co. vs. Margolis, 11 Cal. App. 2d, 382, where it was held that there was no ambiguity in such a clause and that after the period of contestability had expired, the incontestable clause precludes any defense that the provisions in the policy for disability benefits were procured by fraud and precludes a contest of the policy on any grounds which are not specifically excepted in the clause itself.

In Thompson vs. New York Life Ins. Co., 9 F. Supp. 248, the Court considered the question whether the ex-

ception had reference to the disability insurance, as a whole, or only to those group provisions relating to it under a subhead entitled "Disability Benefits", and resolved the ambiguity in the insured's favor.

The language of the clause, "except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits", suggests the prospective and induces the belief that the subject matter of the defenses that may be asserted after the two year period refers to future occurrences and not the past.

CONCLUSION.

We submit the foregoing sufficiently shows the conflict between the circuit courts which have passed upon the question here involved and the probable error in the ruling of the court below.

Respectfully submitted,

CHARLES J. MARGIOTTI,

CHARLES H. SACHS,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1937.

No. 596.

JOHN G. RUHLIN, JENNIE B. RUHLIN, *et al.*,
Petitioners,

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

CHARLES J. MARGIOTTI,
720 Grant Building,
Pittsburgh, Pa.

CHARLES H. SACHS,
1124 Frick Building,
Pittsburgh, Pa.
Attorneys for Petitioners.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
JOSIAH SMITH CO., PENNSYLVANIA REPRESENTATIVE,
704 SECOND AVENUE, PITTSBURGH, PA.

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SUBJECT INDEX.

CITATIONS.

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BRIEF FOR PETITIONERS.

I.

Opinions below.

The opinion of the District Court is not reported but is found at page 19 of the Record. The opinions of the Circuit Court of Appeals are not reported and are found at pages 25 and 39 of the Record.

II.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on September 27, 1937 (R. 43). Jurisdiction to issue the writ is found in the provisions of Section

240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 section 1, (43 Stat. 938, 29 U. S. C. A. section 347, p. 359).

The date of the decree of the Circuit Court of Appeals, sought to be reviewed is September 27, 1937 (R. 39).

The petition for writ of certiorari was docketed to No. 596 October Term, 1937, on November 23, 1937. The writ of certiorari was granted on January 3, 1938.

III.

Statement of the case.

Prior to February 14th, 1935, John G. Ruhlin, the insured, brought an action at law against respondent in the Court of Common Pleas of Jefferson County, Pennsylvania, to recover certain monthly income payments, hereinafter referred to as disability payments, equal to $10 per $1,000 of the face of five policies of life insurance issued by respondent to the insured and under the terms of which respondent agreed to pay to insured said benefits upon receipt of due proof that the insured is totally and presumably permanently disabled before age 60, as defined under "Total and Permanent Disability" in said policies which were issued on the following dates:

No. 10,452,365	December 1, 1928,	face amount	$10,000
No. 10,452,366,	December 1, 1928,	face amount	5,000
No. 11,165,728,	July 7, 1930,	face amount	4,000
No. 11,165,729,	July 7, 1930,	face amount	4,000
No. 11,165,730,	July 7, 1930,	face amount	4,000

(R-2-4)

The applications for the first two policies were made in Pennsylvania and the policies were presumably

delivered in Pennsylvania. The applications for the remaining three policies were made in Ohio and the policies were presumably delivered there.

Each of the policies contained the following incontestable clause:

> "Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

On February 14, 1935 respondent caused said bill in equity to be filed reciting the institution of said action at law to recover said disability benefits, the issuance of said policies, that they had been obtained by means of false and fraudulent answers to questions contained in the applications for said policies and prayed for the reformation of said policies by eliminating and rescinding the disability and double indemnity provisions from said policies and for an injunction restraining the insured and the beneficiaries named therein, the other petitioners herein, from instituting any action on said policies including said action at law, pending at the time of the filing of the bill (R. 2).

Upon presentation of the bill the court issued a restraining order and granted a rule to show cause why a temporary injunction should not be granted (R. 12).

On March 2, 1935, petitioners filed motions to dismiss the bill of complaint and to dissolve the temporary injunction (R. 14).

On April 16, 1935, the court made an order overruling petitioners' motions to dismiss the bill and to dissolve the temporary injunction and enjoining petitioners from instituting any actions against respond-

ent and from proceeding with said action instituted in the state court and noted an exception to petitioners (R. 19).

On October 6, 1936, the Circuit Court of Appeals (consisting of Circuit Judges Davis and Thompson and District Judge Watson) filed an opinion affirming that part of the decree of the District Court which refused to dismiss the bill insofar as it sought the cancellation of the disability benefit provisions, and vacated the order restraining petitioners from prosecuting the action brought in the state court (R. 25).

On September 27, 1937, the Circuit Court of Appeals (consisting of Circuit Judges Buffington, Davis and Thompson), after a reargument, rescinded the previous decree of the Circuit Court of Appeals and affirmed the decree of the District Court (R. 39).

On November 23, 1937, petitioners filed in this Court a petition for writ of certiorari. Respondent filed a memorandum raising no objection to the granting of the writ and on January 3, 1938, this writ was granted.

IV.

The Question Presented.

The policies involved in this suit contain the following clause:

> "Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

The provisions and conditions relative to "Disability and Double Indemnity Benefits" in said policies

provide they shall be payable upon receipt of proof, and, as relates to double indemnity, that the benefits shall be payable only if death resulted in a particular manner and not if it resulted from self destruction, etc., etc., and, as relates to disability benefits, that they shall be payable only if the insured is through injury or disease wholly prevented from performing any work, etc., for remuneration or profit, and then only if such disability occurs before the insured reaches a certain age; that they shall not apply if the disability resulted from self-inflicted injury or from military or naval service in time of war, or to the temporary or paid up insurance provided under "Surrender Values," etc., etc.; that due proof of the continuance of the disability may be demanded from time to time but, under certain circumstances, not more than once a year. There is no mention in these "provisions or conditions" that the sums promised are not recoverable in case of false answers in the application nor anything to indicate that they stand upon a different footing from the other obligations of the insurer in the policy in regard to defenses for alleged fraud in the procurement of the contract.

Is an intent clearly shown to except disability benefits from the incontestable clause?

V.

Specification of Error.

The Circuit Court of Appeals erred in holding (R. 41) that after the expiration of the period reserved for contests in the incontestable clauses of the life insurance policies, the respondent was not barred and precluded from rescinding the double indemnity and dis-

ability benefits contained in said policies on the ground of fraud in the procurement thereof.

VI.

ARGUMENT.

Summary.

The purpose of an incontestable clause in a life insurance policy is, concededly, to bar the defense of fraud in procuring the insurance after a certain period.

Respondent is attempting to contest these policies for fraud after the period has expired. The incontestable clause in these policies bars such defense. As drawn by the insurer, the exceptions to incontestability, contained in the clause, reserve the right to defend only for matters occurring subsequently to the issuance of the policy, such as non-payment of premium and matters intending to show that a claim for double indemnity or disability benefits made under the policy does not come within the provisions and conditions relating to such benefits contained in the policy.

If the incontestable clause is susceptible, also, of another construction, namely, that the double indemnity and disability benefit portion of the policy never becomes incontestable for false answers in the application, the insurer has used language which is uncertain and ambiguous and susceptible of two different but sensible or reasonable constructions. The one most favorable to the assured must be adopted.

The policies of life insurance involved in this case obligate the insurer to pay to the beneficiary certain sums upon the death of the insured and double that

amount, called "double indemnity," if his death results solely through accidental means. They also obligate the insurer to pay to the insured a certain sum, called "disability benefits," in the event that he is physically disabled.

The policies contain the following incontestable clause (R. 12):

> "Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

More than six years after the first two policies were issued, and about four years and five months after the last three policies were issued (R. 124), respondent filed a bill to have the double indemnity and disability benefits rescinded and declared void because of fraud in the answers to the applications for the insurance. Three months previously, a claim for disability benefits was made by the insured (R. 5).

The question is whether the insurer can, after the contestable period has passed, deny its liability to pay these benefits because of false answers in the application. We contend it cannot because, by the incontestable clause, it covenanted not to attack the *validity* of the policy after two years from its date of issue and that the only matters embraced in the exceptions are non-payment of premium and matters relating to the provisions and conditions relating to the double indemnity and disability benefits, among which fraud in procuring the policy is not included.

We further contend that if upon one reading of the clause, the above seems to be its purport, and, upon

another reading, it lends itself to an argument that only one-half or one-third of it becomes incontestable or unassailable for alleged false answers in the application, after two years from date of issue, the first construction, favoring the insured, must upon familiar principles be accepted as the correct one.

In New York Life Ins. Co. v. Kaufman, 78 F. (2d) 398, (C. C. A. 9, cert. den. 296 U. S. 626) the Court, having before it an identical incontestable clause, so far as disability benefits are concerned, in a policy gotten up like the ones involved here, said (p. 404): "The ordinary man reading the clause would believe the provisions referred to were those included in the word 'Policy' at the beginning of the clause and not to the provisions in the application which is not mentioned," and held that it precluded a contest of the disability insurance for fraud in its procurement after the expiration of the period reserved in the policy for contest.

This Court, in Stroehmann v. Mutual Life Ins. Co., 300 U. S. 435, 81 Law Ed. 732, where a substantially similar incontestable clause was involved, held that no intent was shown to except disability benefits from the clause. The two clauses are as follows:

Stroehmann Case:	This case:
"Incontestability,—Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively, this Policy shall be incontestable af-	"Incontestability. — This policy shall be incontestable after two years from its date of issue except for nonpayment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

ter one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

(In the Kaufman case, *supra,* the words "and Double Indemnity" were omitted. Otherwise, the clauses are identical.)

This Court said in the Stroehmann case:

> "Examination of the words relied upon to show an exception to the incontestability clause of the policy discloses ample cause for doubt concerning their meaning. The arguments of counsel have emphasized the uncertainty. The District Court and the Circuit Court of Appeals reached different conclusions, and elsewhere there is diversity of opinion."

There is no *substantial* difference between the two incontestable clauses, set out in parallel columns above. Scientists tell us that no two snow flakes look alike under the miscroscope. Yet, to the average person, they do look substantially alike. So to the average person, the two clauses are substantially alike, aside from the period when they begin to operate. One has the exceptions at the beginning, the other has them at the end. The one uses the words "restrictions and provisions", the other, "provisions and conditions". The one uses the participle "applying", the other, "relating". The one uses the phrase "Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively", the other, "Disability and Double Indemnity Benefits". The part which, in our opinion, is more important is *word for word* the same,—"this policy shall be incontestable" (Stroehmann case), "This policy shall be incontestable" (our case). These policies "sell" the idea that the policy, *as an entirety,* is incon-

testable, and so some of the courts have observed. The Mutual policy refers to the places where the restrictions and provisions applying to these benefits appear, by section numbers. The New York Life policy leaves the policy holder to find the places because it does not happen to have its provisions or sections numbered. The difference is not important.

The courts in the Kaufman case, *supra,* and in Goodley v. New York Life Ins. Co., 70 P. (2d) 602, (Cal. Supreme Ct.), held the incontestable clauses of the Mutual Life Insurance Co. and the New York Life Insurance Co., set out above, to be substantially the same. The *policies,* as well as the incontestable clauses, are substantially alike. In the Stroehmann policy, the company agreed to pay the beneficiary a certain sum upon the death of the insured, or double that amount if his death resulted from accidental bodily injury, all upon conditions set forth in Sec. 1, and, if the insured is totally and presumably permanently disabled before age 60, to pay to the insured a certain sum monthly during such disability, with increases after five and ten years continued disability, besides waiving premium payments, all upon the conditions set forth in paragraph 3.

In this case, the company, using almost identical language, agreed to pay to the beneficiary a certain sum upon the death of the insured or double that amount if such death resulted from accident, as defined under "Double Indemnity", and subject to the provisions therein set forth, and if he is totally and presumably permanently disabled before age 60, to pay to the insured a certain sum each month and to waive premiums "as provided therein" (R. 8).

The difference is—and this is not material—the one policy concludes the provision relating to disability benefits with the phrase, "all upon the conditions set forth in Section 3", and the other, with, "as provided therein".

The provisions[1] setting out the terms and conditions upon which the double indemnity and disability benefits accrue are substantially the same. *This Court pointed out in the Stroehmann case that neither sections 1 or 3 contain anything relative to fraud in the policy or the effect of false statements in the application.* The same is true of the double indemnity and disability benefits provisions in our policies.

The incontestability clause in our policies, whether intentionally or not, is drawn in such a way as to induce the belief that the policy, *in its entirety,* is not to be contested after two years, except for such matters as ~~much~~ must occur in the future, failure of the insured to do those things which it is plain he must do, such as to pay premiums, furnish proof, submit to examination, the happening of certain things which are expressly excepted from the coverage, such as, voluntarily injuring himself, or injuries sustained while committing assaults, etc., etc. It directs the attention to the subject of prospective matters and takes the mind away from the idea that the insured will never have a wholly incontestable contract, by two things, *one,* by the intro-

[1]The provisions and conditions are numerous and are segregated in a separate page of the policy which takes up about two and one half pages of the printed Record (9-12). Outside of the face page, the policy consists of five pages, aside from the copy of the application. The first is devoted entirely to the double indemnity and disability provisions and conditions and has a heavy border surrounding the page, the only one of the five pages having a border. The face page has a border but of a different type. A photostat of a policy (reduced) is attached to this brief.

duction, "This *policy* shall be incontestable", and, *two*, by listing as the *first* exception to incontestability, the failure to pay premium.

This method of drafting an incontestability clause is very aptly described by the Court in the Kaufman case, *supra*, as "put in and take out". The Court said (402):

> "The insurance company properly construes the policy portion of the entire contract to contain two completely separable insurance agreements—one against death and the other against total disability. It contends that the disability insurance as an entirety is made contestable for a fraudulent breach of provisions in the application by the italicized phrase in the following clause in the policy: 'Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and *except as to provisions and conditions relating to Disability Benefits.*'
>
> These two separate and entire insurances constitute the 'Policy'. Both were first placed in the incontestability clause by the use of the words 'This Policy shall be incontestable', and then, the company urges, the separate insurance against disability, *as an entirety*, is taken out of incontestability and restored to contest, by the phrase 'except as to provisions and conditions relating to Disability Benefits.'
>
> On the argument, the company described the incontestability clause as a 'selling point' with the company's solicitors. This we accept as a fact, for the clause, after its period elapses, protects the insured's dependents against a contest for fraud claimed after his death, in which, if alive, he would be the principal witness. It also may protect the insured from such charge after his disability has weakened his memory and resistance and destroyed his power to earn his expenses of litigation. The courts have declared the clause available to the honest seeking its beneficience, despite the fact that it makes indefensible such

grossly reprehensible fraud as Kaufman admits. Wright v. Mutual Benefit Life Ass'n, 118 N. Y. 237, 23 N. E. 186, 187, 6 L. R. A. 731, 16 Am. St. Rep. 749; Murray v. State Mutual Life Ins. Co., 22 R. I. 524, 48 A. 800, 801, 53 L. R. A. 742; Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, 177, 44 S. Ct. 90, 68 L. Ed. 235, 31 A. L. R. 102.

On the company's solicitors pointing out this 'selling' clause to the ordinary man, he certainly would be mystified that such 'put in and take out' drafting of two completely independent insurances was necessary for the simple statement: 'The *life* insurance of this policy is incontestable after two years, except for non-payment of premiums'.

His natural inference would be that the disability insurance would not be mentioned in the incontestability clause unless something about disability was to be freed of contest.

Counsel strongly urged, in explanation of such drafting, that the court take judicial notice of a business rivalry between groups of life and accident companies in New York, in the process of which the incontestability clause was redrafted to its present form in aid of its warring solicitors. While the court has judicial knowledge of the New York statutes, it can know nothing, outside the record, of the company's business history as causing such draftmanship even if it were relevant to its interpretation. Much less can such knowledge be imputed to the ordinary man solicited to take the insurance."

The following cases support the contention of petitioner:

Stroehmann v. Mutual Life Ins. Co. of N. Y., 300 U. S. 435, 81 L. Ed. 732;

Ness v. Mutual L. Ins. Co. of N. Y., 70 F. (2d) 59, (C. C. A. 4);

Mutual Life Ins. Co. of N. Y. v. Markowitz *et al.*, 78 F. (2d) 396 (C. C. A. 9), cert. den. 296 U. S. 625;

New York Life Ins. Co. v. Truesdale, 79 F. (2d) 481, (C. C. A. 4);

New York Life Ins. Co. v. Kaufman, 78 F. (2d) 398, (C. C. A. 9), cert. den. 296 U. S. 626;

Horwitz *et ux.* v. New York Life Ins. Co., 80 F. (2d) 295 (C. C. A. 9);

New York Life Ins. Co. v. Yerys, 80 F. (2d) 264 (C. C. A. 4);

Thompson v. New York Life Ins. Co., 9 F. Supp. 248 (Dist. Ct. Okla); affirmed on other ground 78 F. (2d) 946 (C. C. A. 10);

Kiriakides v. Equitable Life Assur. Soc. of U. S., 177 S. E. 40 (Sup. Ct. S. C.);

Mutual Life Ins. Co. of N. Y. v. Margolis, 53 P. (2d) 1017, (Cal.);

Wilson v. Equitable Life Ins. Co., 262 N. W. 525 (Sup. Ct. Iowa);

Coodley v. New York Life Ins. Co., 70 P. (2d) 602;

New York Life Ins. Co. v. Thomas *et ux.*, 27 Dist. & County Reports (Pa.) 215 (Common Pleas Luzerne Co.)

In Coodley v. New York Life Ins. Co., 70 P. (2d) 602, where a clause and a policy similar to the one in the case at bar were involved, except that the policy did not include double indemnity benefits, the Court said:

> "The validity and binding effect of an incontestable clause upon the parties to an insurance policy was sustained by this court in the case of Dibble v. Reliance Life Insurance Co., 170 Cal. 199. It was there held 'that a provision in a life insurance policy to the effect that after being in force the specified time, it shall be incontestable,

> precludes any defense after the stipulated period on account of false statements warranted to be true, even though such statements were fraudulently made, unless by the terms of the policy fraud is expressly or impliedly excepted from the effect of such provision.' This rule seems to be universally accepted. (Encyclopedia of Law of Insurance (Couch), sec. 2155, p. 6961; Cooley's Briefs on Insurance, vol. 5, p. 4501 *et seq.*; Joyce on Insurance (2d ed.), vol. 5, pp. 6112 and 6113.)''

Then, after referring to the insured's contention, that the exception in the incontestability clause "as to provisions and conditions relating to disability benefits" reserves only unto the insurance company the right to set up as defenses against any claims for disability benefits, the provisions and conditions set forth in the body of the policy, viz., on page headed "Total and Permanent Disability,"[1] and that fraud not being mentioned as a provision or condition under such heading, and not being excepted in the incontestable clause itself, the insurer is barred and precluded by the incontestable clause from contesting the policy on the ground of fraud in the application, says:

> "The legal proposition involved in this cause has been the subject of many recent decisions of both our federal and state courts. We will briefly refer to those of the federal courts. The case of Ness v. Mutual Life Ins. Co. of New York, 70 Fed. (2d) 59, decided in 1934 by the Circuit Court of Appeals of the Fourth Circuit, construed an incontestable clause in a life insurance policy substantially the same in legal effect as the clause now under discussion in the policy issued to the respondent. In the opinion in that action the court reviews the decisions of various courts that have had before them the question now before us. It will not be necessary to give in detail the rea-

[1]Our policies have the "provisions and conditions" in the same way, on a separate page, similarly headed.

sons upon which the court based its conclusions nor to discuss the authorities upon which the decision is based. It is sufficient to state that the court upheld the contention of the insured that the incontestable clause precluded and debarred the insurance company in its action to have the policy rescinded from raising the question of the insured's fraud in the procurement of the policy. No petition for writ of certiorari to the Supreme Court of the United States was made in that action. That decision was followed by two from the Circuit Court of Appeals of the Ninth District, decided May 13, 1935. (New York Life Ins. Co. v. Kaufman, 78 Fed. (2d) 398, and Mutual Life Ins. Co. of New York v. Markowitz, 78 Fed. (2d) 396.) A petition to the Supreme Court to review the Kaufman case was denied. No such petition was made in the Markowitz case. Those cases were followed by three decisions of the Circuit Court of the United States, all contrary to the conclusions reached in the Ness, Kaufman and Markowitz cases. These later cases were Pyramid Life Ins. Co. v. Selkirk, 80 Fed. (2d) 553, decided January 3, 1936 (Fifth Circuit); Mutual Life Ins. Co. of New York v. Stroehmann, 86 Fed. (2d) 47, decided October 6, 1936 (Third Circuit) and Gatti v. New York Life Ins. Co. (not reported), decided October 6, 1936 (Third Circuit). No petition for review was made in the Selkirk case. A petition was made and granted in the Stroehmann case, and a rehearing was granted in the Gatti case. The Stroehmann case came on for hearing before the Supreme Court of the United States and a decision therein was rendered March 29, 1937 (Stroehmann v. Mutual Life Ins. Co. of New York, 57 Sup. Ct. Rep. 607), reversing the judgment of the Third Circuit Court of Appeals, and following the Ness, Kaufman and Markowitz cases. This decision of the Supreme Court appears to be predicated upon its conclusion that the incontestable clause was uncertain and that by the well-established rule governing the interpretation of insurance policies, this uncertainty must be construed in favor of the insured. The final para-

graph of the decision of the court reads as follows: 'Without difficulty respondent (the insurance company) could have expressed in plain words the exception for which it now contends. It has failed, we think, to do so, and applying the settled rule, the insured is entitled to the benefit of the resulting doubt.'

In view of these decisions of the federal courts, we think it unnecessary to review the cases from the state courts involving the construction of a clause like that contained in the policy issued to the respondent. They are not in entire harmony, but when considered with those from the federal courts, we think that the great weight of authority supports the position of the respondent in this action. We will, however, refer to one case from our own state, decided by the Third District Court of Appeal; being the only case to our knowledge in this state in which an incontestable clause similar to that contained in the policy issued to respondent has been construed. The case referred to is Mutual Life Ins. Co. v. Margolis, 11 Cal. App. (2d) 382. While the court in that case held that there was no ambiguity in such a clause, it further held that after the period of contestability had expired an incontestable clause precludes any defense that the provisions in the policy providing for disability benefits were procured by fraud, and precludes a contest of the policy on any grounds which are not specifically excepted in the clause itself.

The authorities cited herein, we think, without any question support the conclusion reached, by the trial court. The judgment, therefore, is affirmed."

In New York Life Ins. Co. v. Thomas, 27 D & C 215, at page 218, the Court said with reference to the precise incontestable clause that we have in our case:

"Certainly within two years the insurer may defend as to death benefits, or as to double indemnity, or as to total disability, on fraud contained

in the application. After two years, where death benefits are sought, it appears to be conceded that fraud in the application no longer constitutes a defense. The purpose is to fix a time limit during which the insurer may investigate the truth or falsity of statements made in the application, precluding, after the passage of that time limitation, such defense, perhaps, after the insured has passed on and his mouth closed by death. This is a valuable asset in the policy, making it thereby the more salable by the insurer and assuring to the insured, after the passage of the limitation, contentment and the feeling of security for his beneficiaries.

From the standpoint of salability by the insurer and its acceptance by the insured, the same reasoning would apply as to double indemnity and as to permanent disability, unless the same is excepted by the contract itself.

The policy, as stated above, provides that the policy and the application constitutes the entire contract. Within the two years a defense may be made as to fraud in the application, because it is part of the policy, but the policy also provides that it shall, after two years, be incontestable except for nonpayment of premiums and except as to provisions and conditions relating to disability and double indemnity benefits. The language does not refer to the contract. The language specifically mentions the policy. The policy is the thing that is incontestable. But it still remains contestable in case of death as to failure to pay premiums and it also remains contestable insofar as there are provisions and conditions relating to double indemnity and disability benefits in the policy. This seems to be the rational interpretation of the clause written by the insurer, against whom, and not for whom, the same should be most favorably interpreted in case of ambiguity, if any exists, according to authority."

There are a number of cases involving the insurer's clause where the courts have said that it means what

the insurer claims it means.[1] This has "only emphasized the uncertainty." When they are read with the cases which support our construction, the confusion becomes "worse confounded."

The insured is just as much interested in a promise of incontestability for the double indemnity and disability insurance as for the rest of the insurance. We do not dispute that a man may agree to take a policy which differentiates between the two kinds of insurance, in the matter of contestability, but the average man would not understand from the way respondent drafted its incontestability clause that the double indemnity and disability benefits were outside of its protection. "Insured laymen," said the Court in New York Life Ins. Co. v. Thomas *(supra)*, "are not to be subjected to hair-splitting reasoning in construing a clause having the plain implication of that in the policy."

The provision that an insurance policy shall be incontestable after the expiration of the specified period means that thereafter, within the limits of the coverage, the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken.

> "The real purpose of an incontestable clause is to prevent any defense which may be raised by the

[1]The Circuit Court of Appeals said in its opinion that the Supreme Court of Pennsylvania has held as it holds on the question here involved, citing Guise v. New York Life Ins. Co., 191 Atl. 626 (R. 41). The Guise case was decided by the Superior Court of Pennsylvania (127 Pa. Super. 127). The defense involved coverage—whether the disability occurred after the insurance became effective or before—and, in the case of one of the policies, whether, assuming the disability arose from bodily injuries or disease occurring before the policy became effective, this was known to the injured and not disclosed in the application. Mayer v. Prudential Life Ins. Co., 121 Pa. Super. 475, the only case cited in the Guise opinion on that branch of the case was one of coverage, also.

> insurance company against the validity of the policy, such as fraud, misrepresentation, and condition of health, arising in connection with the issuance of the policy; but as to such provisions and conditions as necessarily must relate to matters which arise after the issuance of a policy and which do not affect the validity of the policy itself, the incontestable clause has not been applied."
>
> Mayer v. Prudential Life Ins. Co., 121 Pa. Super. 475.

Respondent attempted, below, to show fallacy in our contention by first calling attention to the purpose of an incontestable clause which is to bar a defense that the policy is void by reason of fraud in the procurement. Then it referred to our contention that the *second* exception was put in to assure to respondent the right to interpose, to a claim for double indemnity and disability benefits, the defense that the conditions imposing upon it a liability for such a claim, under the terms of the policy, have not been met or fulfilled. It then argued that the second exception must have been put in to mean something else which, it said, was the right to contest the validity of the policy for fraud.

However, to make that point, it had to ignore the existence of the *first exception* in its incontestable clause which is a reservation of the right to contest the policy for nonpayment of premium. That, also, is prospective. Since, as it says, "an incontestability clause was never intended to apply to defenses that might accrue or events that might happen after the policy was issued," why did it, by its *first* exception, save to itself a defense for an event that might happen after the policy was issued, namely, default in payment of premium?

Moreover, by the Act of May 17th, 1921, sec. 410, P. L. 682, Art. IV (40 P. S. sec. 510), in force at the time these policies were issued, it is provided: "No policy of life * * * insurance, * * * shall be issued or delivered * * * unless it contains in substance the following provision: * * * (c) a provision that the policy shall be incontestable after it has been in force, during the lifetime of the insured, two years from its date of issue, except for non-payment of premiums, and for engaging in military or naval service in time of war, without the consent in writing of an executive officer of the company." It will hardly be claimed that a legislative agent of policy holders took any hand in drafting the provisions for life insurance policies. Of course, it is the insurance company's agents that watch legislation affecting their business and do all they can to have their interests taken care of. Here; again, we have prospective matters, a number of them, put into an incontestability clause which has, or *should have,* nothing to do with such matters.[1]

Respondent cannot plead that it inserted the first exception because of the mandate of the statute. The only thing that was mandatory was the incontestability clause, but not the exceptions, and, as a matter of fact, it did not consider the exceptions mandatory for it omitted the second one, referring to engaging in military or naval service. However that may be, we have shown that regardless of the fact that "an incontestability clause was never intended to apply to

[1]The probability is that the form of the incontestable clause, substantially in the language that the policy shall be incontestable after a certain period except for nonpayment of premium, was first drafted by the insurance companies when there was no statute requiring its inclusion in policies and that it was adopted in the statutes when legislatures determined they had a right to legislate on the subject of life insurance.

defenses that might accrue or events that might happen after the policy was issued," respondent and the draughtsman of the clause in the above statute misunderstood the true function of such a clause by excepting from its operation things upon which it would not operate, anyhow, unless that action was due to the conflict in the decisions upon the operation of an incontestability clause, referred to later herein. The average person cannot be blamed for believing that the exceptions in the incontestability clause refer to things of the future when insurance companies and legislatures put such things in as exceptions to such a clause.

> "Condition": Something to be done; something established as a requisite to the doing or taking effect of something else; an agreement or stipulation in regard to some uncertain future event, but annexed to it by the parties providing for a change or modification of their legal relation upon its occurrence; a clause in an agreement which has for its object to suspend, rescind, or modify the principal obligation; * * * that which limits or modifies the existence or character of something; a restriction or qualification.
>
> 12 C. J. 399 (citing cases).

Funk & Wagnalls Practical Standard Dictionary defines the word:

> "An event, fact or the like that is necessary to the occurrence of some other, though not its cause; a prerequisite."

The legal and popular meanings of the word are the same and they indicate the future. The word "provisions," used as it is in the clause, coupled closely with "conditions," gives the idea of a synonym. If "provisions" meant false answers in the application, and reserved the defense of fraud, there was no necessity of going further and inserting "conditions."

Respondent says that to test the soundness of our contention, it will begin by asking a few questions: "If the second exception were not in the incontestability clause, could it be held that the company would be estopped, after two years from the date of issue of the policy, from raising any defense against a claim for disability benefits or double indemnity? If the second exception were not in the incontestability clause, could it be held that the company was liable for disability benefits, without being given the opportunity to prove that the insured was not disabled? If the second exception were not in the incontestability clause, could it be held that the company was liable for double the face of the policy, without being given a chance to prove that the death was not accidental?"

We will test the soundness of *respondent's* contention by asking a few similar questions. If the *first* exception were not in the incontestability clause, could it be held that the company would be estopped, after two years from the date of the issuance of the policy, from raising a defense against a claim for such benefits that the premiums had not been paid? If the *first* exception were not in the incontestability clause, could it be held that the company was liable for disability benefits without being given the opportunity to prove that the insured had not paid the premiums?

The basis of respondent's argument that it could not possibly have meant, by its second exception, what we contend it meant, is disposed of by the Court in the case of New York Life Ins. Co. v. Kaufman *(supra,* p. 403): "It is more rational to suppose that the contestability clause which the excepting phrases saves is as to the satisfaction of the conditioning requirements,

even if prior decisions of the courts have held such precaution unnecessary.'' But many other decisions make such precaution wise.

> ''The purpose of the second exception in the incontestability clause was to make clear that, notwithstanding the provisions of that clause, the company reserved the right to rely upon the restrictions and provisions contained in sections 1 and 3. Thus the right was reserved to contest, under section 1, liability for double indemnity in case of suicide or death resulting from military or naval service or from engaging in felony. And the right was reserved to contest, under section 3, claims for disability where due proofs had not been furnished, or where upon request of the company proofs of the continuance of the disability had been refused, or where the disability resulted from self-inflicted injury or from military or naval service beyond the continental limits of the United States and Canada. Under some recent decisions defenses under clauses such as those contained in sections 1 and 3 are held not to be precluded by the incontestability clause. See Scales v. Jefferson Standard Life Ins. Co., 155 Tenn. 412, 295 S. W. 58, 55 A. L. R. 537, and note, and Wright v. Philadelphia Life Ins. Co. (D. C.) 25 F. (2d) 514, and cases there cited. *But in many jurisdictions it is held that the incontestability clause does preclude a defense based upon such provisions.* See notes in 55 A. L. R. 549 and 67 A. L. R. 1364. *It was evidently to guard against a construction of the policy holding that the defenses reserved in sections 1 and 3 were precluded by the incontestability clause, that the second exception in that clause was inserted.*'' (Italics ours.)
>
> Ness v. Mutual Life Ins. Co. of N. Y., 70 F. (2d) 59 (C. C. A. 4).

It is thus clear that the courts have not agreed on the distinction between matters of coverage and the matter of the validity of the policy. And this confusion

has been the cause of considerable conflict with respect to the operation of the incontestability clause.

Vance on Insurance, page 821, shows this conflict:

> "If the defense which the insurer seeks to set up is reserved to the insurer by the terms of the incontestable clause itself, obviously the clause will not bar the insurer's right to avail himself of this defense. In many cases the clause itself provides that it shall not be applicable to such defenses as fraud, or suicide. But difficulty comes with those cases where an attempt is made in the policy to exclude the risk, but not in the incontestable clause. The question whether the incontestable clause overrides the attempted exclusion in the policy has been made to depend on whether the exclusion was by a technical exception, or merely by a condition, the breach of which would enable the insurer to terminate his liability. The incontestable clause should be construed merely as an agreement on the part of the insurer not to contest the validity of the policy as written. On principle, it should not operate to prevent the defense of an action, even after the expiration of the contestable period, on the ground that the loss was not covered because excepted under the terms of the policy. This distinction between risks expressly excepted from the coverage of the policy, and mere conditions in the policy giving to the insurer the power of terminating his liability thereon, has been recognized in several jurisdictions. Thus where the policy expressly excepted the risk of death by suicide within one year, the insurer need not make a contest within the designated contest period in order to defend on the ground that the insured took his own life within the year. However, many courts have failed to distinguish between such excepted risks, and mere conditions in the policy, holding that in either event such defense is barred to the insurer unless asserted within the contest period. Thus even though the policy provided that 'self-destruction, sane or insane, within one year from the date of this policy is a

> risk not assumed by the company under this policy,' it has been held that the privilege of defending after the time limit for contest, on the ground that the insured committed suicide within the year, was barred.
>
> "It seems to be uniformly held that where the defense sought to be raised is a mere condition, not contained in the incontestable clause, it will be barred if not asserted within the contestable period. Thus where the policy provides that it will be avoided if the insured commits suicide within a year, the insurer must institute his contest within the time fixed by the incontestable clause. Likewise the incontestable clause has been held to preclude the insurer from showing in defense that the insured came to his death in consequence of a violation of the law, contrary to a policy condition; or by execution for crime."

It is reasonable to conclude that respondent, knowing of the diversity of decisions, and anticipating that it might be sued in a jurisdiction which holds that the incontestable clause bars defenses for future occurrences—non-fulfillment of the provisions and conditions in the policy that deal with matters of coverage—drew the second, as well as the first, exception to incontestability so as to save to itself such defenses.

Respectfully submitted,

CHARLES J. MARGIOTTI,
CHARLES H. SACHS,
Counsel for Petitioners.

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NEW YORK LIFE
INSURANCE COMPANY
A MUTUAL COMPANY

AGREES TO PAY

to JENNIE B., WIFE OF THE INSURED, ***

*** Beneficiary
(with right on the part of the Insured to change the Beneficiary in the manner provided herein)

*** TEN THOUSAND *** Dollars
(THE FACE OF THIS POLICY)

upon receipt of due proof of the death of

*** JOHN G. RUHLIN *** the Insured,

or *** TWENTY THOUSAND *** Dollars
(DOUBLE THE FACE OF THIS POLICY)

if such death resulted from accident as defined under "Double Indemnity" and subject to the provisions therein set forth.

And upon receipt of due proof that the Insured is totally and presumably permanently disabled before age 60, as defined under "Total and Permanent Disability",

THE COMPANY AGREES TO PAY TO THE INSURED

*** ONE HUNDRED *** Dollars

each month, and to waive payment of premiums, as provided therein.

This contract is made in consideration of the application therefor and of the payment in advance of the sum of $ 206.60, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the TWENTY-EIGHTH day of MAY Nineteen Hundred and TWENTY-NINE, and of a like sum on said date and every SIX calendar months thereafter during the life of the Insured.

(The above premium includes $ 5.20 for the Double Indemnity Benefit and $ 19.30 for the Disability Benefits.)

The premium paying period may be shortened by application of dividend additions and dividend deposits as provided herein.

This Policy takes effect as of the TWENTY-EIGHTH day of NOVEMBER Nineteen Hundred and TWENTY-EIGHT, which day is the anniversary of the Policy.

THE BENEFITS AND PROVISIONS printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be signed this FIRST day of DECEMBER Nineteen Hundred and TWENTY-EIGHT

Frederick W. Johnson
Secretary

Darwin P. Kingsley
President

928-3
O. L.
D.-D. I.

Age 42

Examined [illegible]

Registrar

Insurance Payable at Death. Premiums Payable during Life unless Dividends Applied to Shorten Premium Paying Period. Disability Benefits. Double Indemnity for Fatal Accident. Annual Participation in Surplus.

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DOUBLE INDEMNITY

The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured results directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury.

Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane, from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in a riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or directly or indirectly from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

Double Indemnity shall not apply to the Temporary Insurance or to the Paid-up Insurance provided herein under "Surrender Values" or to any Dividend Additions provided under "Participation in Surplus - Dividends."

Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for the Double Indemnity Benefit.

TOTAL AND PERMANENT DISABILITY

Disability shall be considered total whenever the Insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this Policy took effect and before the anniversary of the Policy on which the Insured's age at nearest birthday is sixty.

Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the Insured is totally disabled as above defined and will be continuously so totally disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the Insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted:

(a) **Waiver of Premium.** The Company will waive the payment of any premium falling due during the period of continuous total disability, the premium waived to be the annual, semi-annual or quarterly premium according to the mode of payment in effect when disability occurred.

(b) **Income Payments.** The Company will pay to the Insured the monthly income stated on the first page hereof ($10 per $1,000 of the face of this Policy) for each completed month from the commencement of and during the period of continuous total disability. If disability results from insanity, payment will be made to the beneficiary in lieu of the Insured.

In event of default in payment of premium after the Insured has become totally disabled as above defined, the Policy will be restored and the benefits shall be the same as if said default had not occurred, provided due proof that the Insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, is received by the Company not later than six months after said default.

The total and irrecoverable loss of the sight of both eyes or of the use of both hands or of both feet or of one hand and one foot shall constitute total disability for life.

Before making any income payment or waiving any premium, the Company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, or if the Insured performs any work, or follows any occupation or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived.

The sum payable in any settlement of the Policy shall not be reduced by income payments made nor by premiums waived under the above provisions. Dividends, loan and surrender values shall be the same as if the waived premiums had been duly paid. Any disability benefit due but unpaid at the time of the Insured's death shall be payable to the person entitled to the proceeds of the Policy.

Disability Benefits shall not apply if the disability of the Insured shall result from self-inflicted injury or from military or naval service in time of war; nor shall these benefits apply to the Temporary Insurance or to the Paid-up Insurance provided herein under "Surrender Values" or to any Dividend Additions provided under "Participation in Surplus - Dividends."

Any premium due on or after the anniversary of the Policy on which the age of the Insured at nearest birthday is sixty will be reduced by the amount of premium charged for Disability Benefits. Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for Disability Benefits.

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PARTICIPATION IN SURPLUS—DIVIDENDS

1— The proportion of divisible surplus to be apportioned upon this Policy shall be ascertained annually. Beginning at the end of the second insurance year, and on each anniversary thereafter, such surplus as shall have been apportioned by the Company to this Policy shall at the option of the Insured be either

(a) Paid in cash; or

(b) Applied toward payment of premiums; or

(c) Applied to purchase a participating paid-up addition to the sum insured (herein referred to as Dividend Additions); or

(d) Left to accumulate at such rate of interest as the Company may declare on funds so held, but at a rate never less than three per cent a year, and the accumulated amount of dividends thereon (referred to as Dividend Deposits) may be withdrawn in cash by the Insured on any anniversary of the Policy or shall be payable at the maturity of the Policy to the person entitled to its proceeds.

If no option is selected, the dividend will be applied to the purchase of a dividend addition to the sum insured. The Insured may surrender any dividend addition for cash at any time not later than three months after any default in the payment of premium, and the cash value thereof shall never be less than the original cash dividend.

DIVIDENDS MAY BE APPLIED TO DECREASE NUMBER OF PREMIUM PAYMENTS OR MATURE POLICY AS AN ENDOWMENT

Whenever the cash value of the Policy, including the cash value of any dividend additions and dividend deposits, shall equal the net single premium at the attained age of the Insured for a fully paid participating Policy of the same kind and amount as this Policy, computed on the same basis as the premium on this Policy, the Company, upon written request of the Insured, will endorse this Policy as fully paid, whereupon the payment of premium will be discontinued; or, whenever said cash value shall equal the face amount of this Policy, the Company, upon due surrender of the Policy, will pay the face amount of the Policy in cash, less any indebtedness to the Company.

MISCELLANEOUS BENEFITS

Assignment. Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility for the validity of any assignment.

Change of Beneficiary. The Insured may from time to time change the beneficiary unless otherwise provided by indorsement on this Policy or unless there is an irrevocable beneficiary of this Policy. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by this Policy for endorsement of the change thereon by the Company, or if lost or destroyed a satisfactory affidavit shall be furnished. After such endorsement this Policy will relate back to and take effect as of the date the Insured signed the written request of change, whether the Insured be living at the time of such indorsement or not, but without prejudice to the Company on account of any payment made or action taken before receipt of such written notice at its Home Office. In the event of the death of any beneficiary before the Insured, the interest of such beneficiary shall vest in the Insured, unless otherwise provided herein.

Grace. If any premium is not paid on or before the day it falls due the policy shall be in default, but a grace of one month (not less than thirty days) will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within the period of grace the overdue premium will be deducted from the amount payable hereunder.

Interest Allowed at Settlement of Death Claims. Interest will be allowed on the proceeds of the Policy payable as a death claim from date of receipt of the proof of death at any office of the Company until the date settlement is made at the Home Office. Interest shall be at the rate declared by the Company on such funds, but at a rate not less than three per cent per annum.

Reinstatement. This Policy may be reinstated at any time within five years after any default, upon written application by the Insured and presentation at the Home Office of evidence of insurability satisfactory to the Company, and upon payment of overdue premiums with six per cent interest thereon from their due date. Any indebtedness to the Company at date of default must be paid or reinstated with interest thereon in accordance with the loan provisions of the Policy.

Privilege of Change to Other Plans of Insurance. At any time before default in payment of premium, provided the Insured is then less than 55 years of age and has not become disabled under the disability provisions hereof, the Insured may, without medical re-examination, exchange this Policy for a Policy upon any plan of insurance then issued by the Company at the rate for this Policy for the then attained age of the Insured, and for the same amount or less than the amount of this Policy, with the same Disability and Double Indemnity benefits, if any, as are provided by this Policy at the time of such exchange. Upon the payment of the difference in premiums with interest at the rate of six per cent per annum from the due date of each premium to the date of exchange, allowance will be made for any Interest cash dividends on the new plan. The new Policy will take effect as of the date of this Policy and the premium will be at the rate which would have been charged if the Policy had been originally issued on the new plan.

Residence, Travel and Occupation. This Policy is free of conditions as to residence, travel, occupation and military or naval service, except as provided herein under Disability and Double Indemnity Benefits.

Rights of Insured. The Insured during his lifetime, and without the consent of the beneficiary, may receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy, unless otherwise provided by indorsement hereon.

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OPTIONAL METHODS OF SETTLEMENT

The Insured, or in case the Insured shall not have done so, the beneficiary after the Insured's death, may, by written notice to the Company at its Home Office, make the proceeds of this Policy, in whole or in part, payable under one of the following options. Any such election or change in election shall not take effect until indorsed on the Policy by the Company at its Home Office. The optional methods of settlement are available whether such proceeds are payable as a death claim or on maturity as an Endowment or upon surrender of the Policy for its cash value, provided the instalment or interest payment to any payee is not less than $10.

Option 1. The proceeds in whole or in part may be left with the Company subject to withdrawal at any time on demand in sums of not less than one hundred dollars. The Company will credit interest annually on the proceeds so left with it at such rate as it may each year declare on such funds, and guarantees that the rate shall be not less than three per cent.

Option 2. The proceeds in whole or in part may be made payable in equal annual, semi-annual, quarterly or monthly instalments for a fixed period as may be agreed upon, in accordance with the following table.

Option 3. The proceeds in whole or in part may be made payable in equal annual, semi-annual, quarterly or monthly instalments for a fixed period of five, ten or twenty years as may be agreed upon, and for the remaining lifetime of the payee, in accordance with the following table.

Option 4. The proceeds in whole or in part may be left with the Company at interest until the death of the payee. The Company will pay interest thereon annually, semi-annually, quarterly or monthly, as may be agreed upon, at such rate as the Company may declare each year on such funds, and guarantees that the interest per one thousand dollars of the proceeds shall be not less than $30 when paid annually, $14.89 when paid semi-annually, $7.42 when paid quarterly, or $2.47 when paid monthly.

Option 5. The proceeds in whole or in part may be left with the Company at interest and paid in equal annual, semi-annual, quarterly or monthly instalments of such amount as may be agreed upon until the entire proceeds left with the Company, including interest thereon as provided in Option 1, have been paid, provided that the fixed amount payable each year shall be not less than five per cent of the original proceeds left with the Company.

The first instalment under Options 2 and 3 will be payable on the date when the proceeds of the Policy become due and the instalment payment on each anniversary of the first payment will be increased by such additional interest, in excess of three per cent per annum, as the Company may declare on such funds for that year. The additional interest under Option 2 will be calculated on the unpaid instalments commuted at three per cent per annum, and under Option 3 on the unpaid instalments for the fixed period selected, commuted at three per cent per annum.

When the proceeds of the Policy become payable the Company will deliver to each payee a certificate evidencing the rights and benefits of such payee under the option selected.

At the death of any payee any unpaid sum left with the Company under Options 1, 4 or 5 with accrued interest to date of payment, or the commuted value at three per cent of any unpaid instalments under Option 2, or the commuted value at three per cent of any unpaid instalments for the fixed period selected under Option 3, will be paid in one sum to the executors or administrators of the payee, unless otherwise agreed in writing.

Unless otherwise directed in writing by the Insured, the benefits under the above options shall not be transferable nor subject to commutation or incumbrance during the lifetime of the payee.

MONTHLY AND ANNUAL PAYMENTS FOR EACH $1,000 OF PROCEEDS OF POLICY

The semi-annual and quarterly instalments are 50.37% and 25.28% respectively of the annual instalment under Option 2, and not less than these respective percentages under Option 3.

OPTION 2

Number of Years Payments	Monthly Payment	Annual Payment
2	$[illegible]	$[illegible]
3	28.99	[illegible]
4	22.06	[illegible]
5	17.91	211.99
6	15.14	179.22
7	13.16	155.83
8	11.68	[illegible]
9	10.53	[illegible]
10	9.61	[illegible]
11	8.86	104.92
12	8.24	[illegible]
13	7.71	91.29
14	7.26	85.94
15	6.87	81.32
16	6.53	77.29
17	6.23	73.74
18	5.96	[illegible]
19	5.73	67.78
20	5.51	[illegible]
21	5.32	62.98
22	5.15	60.91
23	4.99	[illegible]
24	4.84	[illegible]
25	4.71	[illegible]
26	4.59	[illegible]
27	4.47	52.97
28	4.37	51.74
29	4.27	[illegible]
30	4.18	[illegible]

OPTION 3 LIFE INCOME TO PAYEE WITH INCOME GUARANTEED FOR

Age of Payee When Proceeds Become Payable	5 Years Certain Monthly Payment	5 Years Certain Annual Payment	10 Years Certain Monthly Payment	10 Years Certain Annual Payment	20 Years Certain Monthly Payment	20 Years Certain Annual Payment
10 and under	$[illegible]	$[illegible]	$[illegible]	$[illegible]	$3.58	$42.20
11	3.83	[illegible]	3.77	[illegible]	3.59	42.36
12	3.85	[illegible]	3.79	[illegible]	3.61	42.54
13	3.87	45.54	3.81	44.84	3.62	42.71
14	3.89	45.78	3.83	45.07	3.64	42.90
15	3.91	[illegible]	3.85	45.29	3.65	43.08
16	3.94	46.27	3.87	45.53	3.67	43.27
17	3.96	46.52	3.89	45.76	3.69	43.47
18	3.98	46.77	3.91	45.99	3.70	43.66
19	4.00	47.02	3.93	46.23	3.72	43.87
20	4.02	47.28	3.95	46.48	3.74	44.07
21	4.05	47.55	3.97	46.74	3.76	44.29
22	4.07	47.84	4.00	47.01	3.78	44.52
23	4.10	48.14	4.02	47.29	3.80	44.75
24	4.12	48.45	4.05	47.59	3.82	45.00
25	4.15	48.77	4.07	47.90	3.84	45.25
26	4.18	49.12	4.10	48.22	3.86	45.51
27	4.21	49.47	4.13	48.56	3.89	45.79
28	4.25	49.85	4.16	48.91	3.91	46.07
29	4.28	[illegible]	4.19	49.28	3.94	46.37
30	4.32	50.65	4.23	49.66	3.96	46.67
31	4.36	51.08	4.26	50.07	3.99	46.99
32	4.40	[illegible]	4.30	50.49	4.02	47.32
33	4.44	[illegible]	4.33	50.93	4.05	47.66
34	4.48	[illegible]	4.37	51.39	4.08	48.01
35	4.52	53.02	4.42	51.87	4.11	48.38
36	4.57	[illegible]	4.46	52.38	4.14	48.75
37	4.62	[illegible]	4.51	52.90	4.17	49.14
38	4.67	[illegible]	4.55	53.45	4.21	49.54
39	4.73	[illegible]	4.60	[illegible]	4.24	49.96
40	4.78	56.02	4.65	54.63	4.28	50.38
41	4.84	56.71	4.71	55.26	4.32	50.82
42	[illegible]	57.43	4.77	55.91	4.35	51.27
43	[illegible]	58.19	4.83	56.60	4.39	51.73
44	[illegible]	58.99	4.89	57.31	4.43	52.20
45	[illegible]	59.83	4.95	58.06	4.48	52.69
46	[illegible]	60.71	5.02	58.84	4.52	53.18
47	5.27	61.64	5.09	59.66	4.56	53.68

Age of Payee When Proceeds Become Payable	5 Years Certain Monthly Payment	5 Years Certain Annual Payment	10 Years Certain Monthly Payment	10 Years Certain Annual Payment	20 Years Certain Monthly Payment	20 Years Certain Annual Payment
48	$5.36	$62.61	$5.17	$60.51	$4.60	$54.20
49	5.45	63.63	5.24	61.40	4.65	54.71
50	5.54	64.70	5.32	62.33	4.69	55.24
51	5.64	65.83	5.41	63.30	4.74	55.77
52	5.74	67.02	5.49	64.30	4.78	56.30
53	5.85	68.26	5.58	65.35	4.83	56.84
54	5.97	69.57	5.68	66.44	4.87	57.37
55	6.09	70.95	5.78	67.57	4.92	57.90
56	6.22	72.40	5.88	68.75	4.96	58.43
57	6.35	73.93	5.98	69.98	5.00	58.95
58	6.49	75.53	6.09	71.24	5.05	59.46
59	6.64	77.22	6.21	72.55	5.09	59.96
60	6.80	78.99	6.32	73.91	5.13	60.45
61	6.96	80.85	6.44	75.31	5.17	60.92
62	7.13	82.81	6.57	76.75	5.20	61.37
63	7.31	84.87	6.70	78.23	5.24	61.80
64	7.51	87.03	6.83	79.75	5.27	62.20
65	7.71	89.31	6.96	81.30	5.30	62.59
66	7.92	91.69	7.09	82.89	5.33	62.94
67	8.14	94.19	7.23	84.50	5.36	[illegible]
68	8.37	96.81	7.37	86.14	5.38	63.57
69	8.61	99.56	7.51	87.79	5.40	63.84
70	8.86	102.43	7.65	89.46	5.42	64.08
71	9.13	105.44	7.79	91.12	5.44	64.29
72	9.40	108.57	7.93	92.79	5.45	64.48
73	9.69	111.84	8.07	94.44	5.47	64.64
74	9.99	115.25	8.21	96.06	5.48	64.77
75	10.30	118.78	8.34	97.65	5.48	64.88
76	10.62	122.44	8.47	99.21	5.49	64.97
77	10.95	126.22	8.59	100.71	5.50	65.05
78	11.29	130.13	8.71	102.14	5.50	65.11
79	11.64	134.14	8.82	103.51	5.50	65.15
80	12.00	138.25	8.92	104.80	5.51	65.19
81	12.36	142.44	9.02	106.01	5.51	65.21
82	12.73	146.70	9.11	107.12	5.51	65.23
83	13.09	151.00	9.19	108.14	5.51	65.24
84	13.46	155.34	9.26	109.06	5.51	65.25
85 and over	13.83	159.67	9.32	109.89	5.51	65.25

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PAGE

GUARANTEED LOAN AND SURRENDER VALUES

LOANS. After three full years' premiums have been paid and before default in the payment of premium, the Company, upon receipt of this Policy and [illegible] satisfactory to the Company, will advance to the Insured on the sole security of this Policy any amount which, with interest, shall be within the limit of the Cash Surrender Value of this Policy. Interest on the loan will be at the rate of six per cent per annum payable annually on the anniversary of the Policy. Any existing indebtedness to the Company on this Policy, including accrued interest thereon, will be deducted from the amount of said loan. If interest is not paid when due it shall be added to the principal. All or any part of the indebtedness may be repaid at any time while the Policy is in force. Failure to repay such indebtedness or to pay interest will not avoid the Policy. But whenever the amount of the total indebtedness equals the Cash Surrender Value the Policy shall become void one month after the Company shall have mailed notice to the last known address of the Insured and of the assignee of record, if any.

SURRENDER VALUES. In event of default in payment of premiums after three full years' premiums have been paid, the following benefits shall apply:

(a) Temporary Insurance. Insurance for the face of the Policy plus any dividend additions and any dividend deposits and less the amount of any indebtedness hereon shall, upon expiry of the period of grace be continued automatically as Temporary Insurance as from the date of default for such term as the Cash Surrender Value less any indebtedness hereon will purchase as a net single premium at the attained age of the Insured according to the American experience table of mortality and interest at 3 per cent. This Temporary Insurance will be without participation in surplus.

(b) Participating Paid-up Insurance. Within three months after such default but not later, the Insured may surrender this Policy and elect in place of such Temporary Insurance to have this Policy indorsed for the amount of Participating Paid-up Insurance which the Cash Surrender Value at date of default less any indebtedness hereon will purchase as a net single premium at the attained age of the Insured at the date of default according to the American experience table of mortality and interest at 3 per cent. The Insured may obtain a loan on such Paid-up Insurance or surrender it within one month after any anniversary for its cash surrender value.

(c) Cash Surrender Value. If the Policy shall not have been indorsed for Participating Paid-up Insurance, the Insured, within three months after such default but not later, may surrender this Policy and all claims thereunder and receive its Cash Surrender Value as at date of default less any indebtedness hereon. The Cash Surrender Value shall be the reserve on the face amount of the Policy at date of default, omitting fractions of a dollar per thousand of insurance, and the reserve on dividend additions and any existing dividend deposits, and less a surrender charge for the third to the tenth years, inclusive, of not more than one and one-half per cent of the face of the Policy. The reserve shall be computed on the basis of the American experience table of mortality and interest at 3 per cent.

CASH SURRENDER VALUE OF FULLY PAID POLICY. If this Policy shall have become fully paid by its terms, the Insured may surrender the Policy and all claims thereunder within one month after any anniversary of the policy and receive its cash surrender value less any indebtedness hereon. Such cash surrender value shall be computed on the basis described under (c) above.

The values in the following Table of Guaranteed Loan and Surrender Values are computed in accordance with the above provisions, on the Insured $1,000 face amount, assuming that premiums have been duly paid to the commencement of the year for which there is no default, prior to the Company that there are no outstanding dividend additions nor dividend deposits, and after deduction of the surrender charge, if any.

TABLE OF GUARANTEED LOAN AND SURRENDER VALUES

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
3	$43	886	3	[illegible]
4	59	116	5	98
5	80	154	6	236
6	100	188	7	340
7	122	225	9	61
8	144	261	10	80
9	167	297	10	324
10	190	332	11	125
11	211	361	11	34
12	233	390	12	[illegible]
13	254	418	12	[illegible]
14	275	443	[illegible]	[illegible]
15	295	467	[illegible]	[illegible]
16	314	488	[illegible]	[illegible]
17	341	[illegible]	[illegible]	[illegible]
18	363	[illegible]	[illegible]	[illegible]
19	384	[illegible]	[illegible]	[illegible]
20	406	[illegible]	[illegible]	[illegible]
21	428	[illegible]	[illegible]	[illegible]
22	449	[illegible]	[illegible]	[illegible]
23	471	[illegible]	[illegible]	[illegible]
24	492	[illegible]	[illegible]	[illegible]
25 Years	512	689	11	[illegible]

Ed. June '16 [illegible] 1000 42

The Loan Values at the end of any year may be secured during that year by an assignment of the premium for the current year has been paid.
Values for Policy years shall be computed on the same basis and [illegible] the Surrender Form required.

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TERM INSURANCE IN CASE OF LOAN

Any loan under this Policy may be covered by term insurance as follows:

1. The Insured must furnish evidence of insurability satisfactory to the Company.

2. The premium shall be computed at the attained age of the Insured at the time the term insurance is [illegible] or renewed.

3. Term insurance shall not extend beyond the next anniversary of [illegible] but [illegible] conditions may be renewed from year to year. No term insurance shall be [illegible] or renewed after age sixty-five.

4. If the said [illegible] loan shall be reduced or [illegible] in accordance with the terms of the Loan Agreement, the term insurance [illegible] automatically be reduced [illegible] accordingly and any unearned premium paid therefor will be refunded.

5. Term insurance takes effect upon delivery to the Insured of the Company's Policy therefor. The sum payable as term insurance shall be applied to the cancellation of the indebtedness.

PREMIUMS FOR EACH $100 OF TERM INSURANCE

15	$0.73	28	$0.79	41	[illegible]	54	$1.67
[illegible]	0.74	29	[illegible]	42	[illegible]	55	1.79
17	0.74	30	0.81	43	[illegible]	56	1.91
18	0.74	31	0.82	44	[illegible]	57	2.05
19	0.75	32	0.83	45	1.07	58	2.21
20	0.75	33	[illegible]	46	[illegible]	59	2.38
21	0.76	34	[illegible]	47	1.15	60	2.57
22	0.76	35	[illegible]	48	1.20	61	2.78
23	[illegible]	36	[illegible]	49	1.26	62	3.01
24	0.77	37	[illegible]	50	1.33	63	3.26
25	0.78	38	[illegible]	51	1.40	64	3.54
26	0.78	39	0.92	52	1.48		
27	0.79	40	0.94	53	1.57		

OTHER PROVISIONS

Age. If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Payment of Premiums. All premiums are payable on or before their due date at the Home Office of the Company or to an [illegible] but only in exchange for the Company's official premium receipt signed by the President, [illegible] Vice-President, a Secretary or the Treasurer of the Company and countersigned by the person [illegible]. No person has any authority to collect a premium unless he then holds said official premium receipt. [illegible] premiums may be payable annually, semi-annually or quarterly in advance at the Company's respective rates for such [illegible] mode of payment may be changed by agreement in writing and not otherwise. [illegible] payment of any premium shall not maintain the Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

Indebtedness. Any indebtedness to the Company against this Policy will be deducted in any settlement thereof.

Self-Destruction. In event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the [illegible] under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more.

The Contract. This Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid this Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is endorsed upon or attached to this Policy when issued. No agent is authorized to make or modify this contract, or to extend the time for the payment of premiums, or to waive any lapse or forfeiture or any of the Company's rights or requirements. All benefits under this Policy are payable at the Home Office of the Company in the City and State of New York.

Incontestability. This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits.

REGISTER OF CHANGE OF BENEFICIARY

NOTE — NO CHANGE OF BENEFICIARY SHALL TAKE EFFECT UNLESS INDORSED ON THIS POLICY BY THE COMPANY AT THE HOME OFFICE

DATE OF REQUEST	BENEFICIARY	INDORSED BY
[illegible]	[illegible]	[illegible] Vice Pres.

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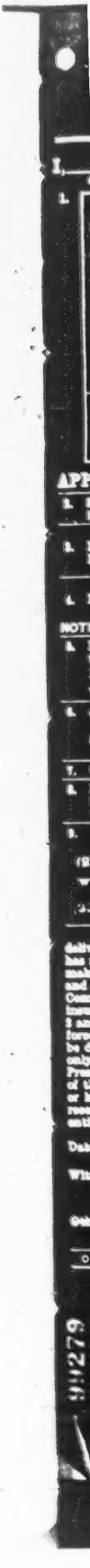

10-452-365

10-452-366

APPLICATION TO THE NEW YORK LIFE INSURANCE COMPANY — Part I.

John E. Ruhlin

(and names in full)

Residence	Place of Business	Present Occupation	
		State exact duties in full	Born at ... on ... day of ... 18... in ...
		Other Occupations (if any)	Married ... Race or nationality ... (Strike out one)
R.F.D.			Send all communications to Residence ... Business ... (Strike out one)
Name of firm or employer			
Former Residence*	Former place of business*		Former firm or employer*

*The answer required unless change has taken place within past two years.

APPLY TO THE NEW YORK LIFE INSURANCE COMPANY FOR INSURANCE AS FOLLOWS:

Amount to be insured, $ 10000 — Premiums how payable, Semi Annual — Age nearest birthday 42

Form of insurance ... with { Disability Benefit, 1% Monthly / Double Indemnity Benefit } — Date Policy as of { date of this application / ... } (Strike out one)

(Strike out benefits not desired)

Dividend to be { a Paid in cash; / b Applied to purchase additional paid-up insurance; / c Applied to purchase additional paid-up insurance; } if Left to accumulate at interest, subject to my order; / d Applied to ... plan. (Strike out four)

(Option c applies only to Endowment policies containing the Accelerative Endowment option.

I designate as Beneficiary to receive the proceeds of policy in event of death, and reserve the right to change the Beneficiary from time to time,

Beneficiary (Print name in full) Jennie E. Ruhlin

Who resides at 173 N. Highland Ave. Akron Ohio Relationship to me ...

The following is all the insurance I now have on my life:

State name of Company and Amount (If none, say none)	
U.S. Ga.	$10000.00

The insurances for which I am now applying is not intended to take the place of insurance carried with this or any other Company. If it is, give particulars: ...

If the insurance on my life the amount which includes benefits in event of total disability is $ ... (If none, say none)

No Company has declined to issue insurance on my life or issued or offered to issue insurance on my life differing from the insurance applied for, except as follows: (If none, say none) None

ADDITIONS OR AMENDMENTS (For Home Office use only)

Written on the O.R.P.P. additional Plan

Application with premium, payable quarterly

It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination, provided, however, that if the applicant, at the time of signing this application, pays the agent in cash the full amount of the first premium for the insurance applied for in Questions 2 and 3 and declares in this application and receives from the agent a receipt therefor on the receipt form which is attached hereto, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan and for the amount applied for in Questions 2 and 3, at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force from and after the time this application is made, whether the policy be delivered to and received by the applicant or not. 2. That a receipt on the form attached as a coupon to this application form is the only receipt the agent is authorized to give for any payment made before the delivery of the policy. 3. That only the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements, that notice to or knowledge of the soliciting agent or the Medical Examiner is not notice to or knowledge of the Company, and that neither one of them is authorized to accept risks or to pass upon insurability. 4. That by delivering and accepting said policy, any additions or amendments hereto which the Company may make and refer to in Question 9 above as "Additions or Amendments" are hereby ratified.

Signed at ... this ... day of ... 192..

Witnessed by ... Agent. Signature of the person applying for insurance ... (Write the name in full)

Agents

Names and Residences of three intimate friends ...

DECLARATION TO BE SIGNED BY APPLICANT UPON MAKING ANY PAYMENT WITH THIS APPLICATION

Dated at ... 192..

I Hereby Declare that I have paid to ... and that I hold his receipt for the same, made up without alteration ... in date and number with the application. I assent to the terms of said receipt.

Signature of Applicant ...

YEAR OFF WORK

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10-452-365

Application to the New York Life Insurance Company—PART II

10-452-366

ANSWERS TO THE MEDICAL EXAMINER

THIS EXAMINATION MUST BE MADE IN PRIVATE; NO AGENT OR THIRD PERSON BEING PRESENT

A.	What is your occupation? *(Full details.)*	A. Contractor
B.	How long have you been engaged in your present occupation?	B. Apprentice 20 years.
C.	What was your previous occupation?	C.
D.	Have you ever changed your occupation or place of residence on account of your health? *(If so, give full details.)*	D. No
	Do you intend to change your occupation or make a journey outside of Continental United States or Canada? *(If so give full details.)*	no
A.	How many aerial flights have you taken and when last?	A.
B.	State whether as passenger or pilot and whether you are a Reservist.	B.
	In what States have you lived the last ten years, and which years in each? *(If outside the U. S., in what countries, and which years in each.)*	Penna. Ohio. Mass.
A.	How frequently, if at all, and in what quantity do you drink beer, wine, spirits or other intoxicants?	A. none.
B.	How frequently, if at all, and in what quantity have you drunk any of them in the past?	B. none.
C.	Have you within the last five years drunk any of them to excess?	C. no
D.	Do you now take or have you ever taken morphine, cocaine, or any other habit forming drugs?	D. no

	"Yes" or "No"	Name of each Company or Insurer.
A. Have you now pending any other application for insurance on your life or for the reinstatement of insurance?	no	
B. Have you ever been examined either on or in anticipation of an application for insurance without receiving such insurance?	no	
C. Have you ever been declined for life insurance or for the reinstatement of life insurance?	no	
D. Have you ever been offered a policy differing in plan or amount or in premium rate from that applied for?	no	

	"Yes" or "No"	If the answer to any query is "Yes" give DETAILS and, if within five years, name and address of every Physician consulted.
A. Have you had any accident or injury or undergone any surgical operation?	no	Appendix February 7th Harvey Jones
B. Have you been under observation or treatment in any hospital, asylum or sanitarium?	no	
C. Has albumin or sugar been found in your urine?	no	
D. Have you been found to have a high blood pressure?	no	
E. Have you raised or spat blood?	no	
F. Have you gained or lost in weight in the last year?	no	Gain? Loss? Cause?

	"Yes" or "No"	Name of Ailment or Disease	No. of Attacks	Date	Duration	Severity	Results and, if within five years, name and address of every Physician consulted
Have you consulted a physician or suffered from any ailment or disease of							
A. The Brain or Nervous System?	no						
B. The Heart, Blood Vessels or Lungs?	no						
C. The Stomach or Intestines, Liver, Kidneys or Bladder?	no						
D. The Skin, Middle Ear or Eyes?	no						
Have you had Rheumatism, Gout or Syphilis?	no						
Have you consulted a physician for any ailment or disease not included in your above answers?	no						

What physician or physicians, if any, not named above, have you consulted or been examined or treated by within the past five years?	Name and Address	Date	Reason for Consultation, Examination or Treatment
	none		

(If none, say none.)

Family Record	Age if Living	Condition of Health, if not good, give full details	Age at Death	Cause of Death	How Long Ill
Father					
Mother	53				
Brothers	61	good health	70	accident	1 day
	55				
Children					

13. A. Is any person in your immediate household now ill with consumption?

(If so, state whether the usual safety precautions are being taken.)

B. Has any person in your immediate household suffered from or died of that disease within the past year?

DO NOT USE DASHES OR DITTO MARKS IN ANSWERING QUESTIONS

On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that ve carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, plete and true, and agree that the Company believing them to be true shall rely and act upon them.

I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all sions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend amine me, from disclosing any knowledge or information which he thereby acquired.

ed this _____ day of _____ 19__

nessed by _____ M. D., Medical Examiner. Signature of the person applying for insurance _____

928-185

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.
No. 596

JOHN G. RUHLIN, JENNIE B. RUHLIN, et al.,
Petitioners

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONERS.

CHARLES J. MARGIOTTI,
720 Grant Building,
Pittsburgh, Pa.

CHARLES H. SACHS,
1124 Frick Building,
Pittsburgh, Pa.
Attorneys for Petitioners.

HERBICK & HELD PRINTING CO. PITTSBURGH, PA.

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SUBJECT INDEX

Citations

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REPLY BRIEF FOR PETITIONERS

Respondent, in its brief, iterates and reiterates the following contention:

> "The **only** purpose of an incontestable clause is to bar defenses which attack the *validity* of the contract." (p. 8)
>
> "The **only** way the second exception in the incontestability clause can be given effect is by applying it to defenses which would otherwise be barred by the incontestability clause, and not by the useless gesture of applying it to defenses which could be raised even if the second exception were not in the incontestability clause." (p. 10)
>
> "Since, then, an incontestability clause applies **only** to defenses *which existed when the policy issued,* or which attack the validity of the contract, the exception to that clause could **only** apply to defenses of a similar character, such as fraud in the procurement of the insurance." (p. 11) (Emphasis supplied.)

But respondent does not always argue that way. Here is what respondent said in another case, when it was explaining how its incontestability clause came to be drawn in that fashion *and what purposes it had in mind* in so drafting it:

> "As pointed out in the quotation from the Deem case, pages 15 and 16 of our argument, the complainant, when it drafted this clause was confronted by early decisions in the federal court, and decisions in some of the state courts that failed to distinguish between a 'denial of coverage and a defense of invalidity'. It was confronted with the problem of drafting a phrase that would allow it to except the

> total disability and double indemnity provisions of the policy from the incontestability clause. It was also confronted with the problem of making it plain that its exception was broad enough to allow it not only to contest the validity of the policy in its inception but also to deny liability where recovery was sought for some injury or on some ground not covered by the total disability or double indemnity provision."[1]

We have the respondent making an argument in one case that the *only* purpose of their incontestable clause is "to bar defenses which attack the validity of the contract", and in another case that it had two purposes in mind in drafting it, the one above mentioned and the other, to clearly reserve the defense of lack of coverage because, as they say further in their letter: "It was advisable, if not necessary, . . . to fully protect itself against misunderstanding upon the part of some court which might fail to distinguish between 'a denial of coverage and a defense of invalidity' ".

> In the concluding paragraph of our brief, we said:
>
> "It is reasonable to conclude that respondent, knowing of the diversity of decisions, and anticipating that it might be sued in a jurisdiction which holds that the incontestable clause bars defenses for future occurrences—non-fulfillment of the provisions and conditions in the policy that deal with matters of coverage—drew the second, as well as the first, exception to incontestability so as to save to itself such defenses."

---

[1]This argument was made by the respondent on January 22, 1938 in the case of New York Life Insurance v. Malloy, Equity 306, pending before Hon. George S. Morris, Judge of the Federal District Court for the District of New Hampshire, in a letter from counsel for respondent to the Judge, a full copy of which is printed as an appendix to this brief.

Respondent, in its brief in *this* case, denies our construction of the clause and the explanation we give why they included prospective matters of defense, such as that a claim made was not covered by the provisions and conditions of the policy. Now, after our brief was printed, we find that in the Malloy case it made the same contention we did and assigned the very reason we did, although it claims it had, also, another purpose in mind in using the language which it did. Respondent may say that different counsel employed by it have a right to ascribe different purposes for the identical clause. But these different purposes are nothing more than different constructions of an act of the respondent, the form of the incontestable clause.

The responsibility for the failure of the courts to always distinguish between "a denial of coverage and defense of invalidity", which respondent referred to in the Malloy case, rests upon the insurance companies themselves, for they created the difficulty. They expect the distinction to be made by the courts' assigning to the word "provisions" the meaning which the word "policy" usually conveys, and they want the courts to understand that when the insurance companies use the word "restrictions" and "conditions" they mean "matters of coverage". Even assuming that courts ought to understand, how can the average layman appreciate these fine points?

The respondent has a fashion of charging everyone —counsel and judges—who fail to agree with them with obtuseness and an inability to comprehend the distinction between a defense of invalidity of the policy because of alleged fraud in its inception and a defense that a claim for disability is unfounded because it does not come within the terms and conditions of the policy. That is not such an intricate matter to understand. As regards the writer, the respondent makes that charge on page 13 of its brief,

wherein it says we confuse these two distinct defenses. We went into that matter pretty fully on pages 24 to 26 of our brief and believe our brief shows we have some glimmering of the subject. So, this respondent made a similar complaint against the Circuit Court of Appeals for the 9th Circuit which decided the case of Kaufman v. New York Life Insurance Co., 78 F. (2d) 398. That court, in its second opinion, page 404, shows that it did have some conception of what the case was about in the following:

> "The insurance company's petition for rehearing urges that the court's second construing of the incontestability clause, with reference to the application portion of the contract, fails to distinguish between the subject-matter of the contests arising under the provisions of disability insurance and the grounds of those contests. It contends that the provisions and conditions of the incontestability clause are all 'subjects' of contest, and hence the only 'ground' of contest is the fraud in the application. The suggestion would be pertinent if well founded. An analysis of the petition's argument shows that it otherwise supports the contentions of the insured, and he is entitled to have it stated in this supplement to the opinion.
>
> "In its petition the insurance company now agrees with appellant's contention that the insured layman would interpret the words of the incontestable clause in the policy 'except as to the provisions and conditions relating to disability benefits' as an 'express exception' into contestability of each of the several provisions and conditions 'which appears *in* the *policy*,' for the purpose of making certain that the company could maintain contests 'as to' them. This interpretation of the company is stated in the

> petition as follows: 'We, therefore, respectfully urge that so far as the subject of contest is concerned, every *condition and provision* which appears *in the policy of insurance,* whether on page 1 or 2 thereof, is *expressly* excepted from the effect of the incontestable clause, and any and all of such conditions and provisions may be contested on any *grounds* affecting their validity subsequent to the expiration of the two-year period referred to in the incontestable clause.***"

We wonder whether respondent expects a layman to understand these involved and difficult to comprehend contentions. It is with such arguments they expect the court to hold the incontestable clause means what they say it means. We contend that from the fact that they introduce the exceptions with something that is clearly prospective—non payment of premiums—they get the mind in the direction of thinking that the other matters —provisions and conditions of the disability benefits— are also prospective, something that may arise in the future. We have shown by their contentions in the Malloy case, that they split the expression "provisions and conditions" in two parts—one, "provisions", which they say saves the defense of original invalidity, and the other, "conditions", which they argue applies to prospective matters, controversies about coverage.

A curious argument is made by respondent, curious because it has maintained time and again, as we have shown above, that the second exception deals *only* with the defense of invalidity in inception:

> "Even if the exception in the incontestability clause of the provisions relating to disability and double indemnity benefits might also be applied to events occurring after the issuance of the policy, such as death of the insured by suicide or in an air-

> plane crash (the latter being also a risk specifically excepted from the double indemnity benefit), still that is no reason why that exception should not also be applied to events which occur before the issuance of the policy, in so far as they affect the disability and accidental death insurance." (p. 18)

This is a very guarded admission but the effect of it is important. If it conceded that the second exception could be construed by some people to apply to events occurring after the issuance of the policy, it amounts to an admission of an ambiguity.

Respondent claims that the weight of authority is with it and in support of that claim cites some cases where the question here involved was not the real issue (such as Kaffanges v. New York Life Ins. Co., 59 F. (2d) 475,[1] Mayer v. Prudential Ins. Co., 121 Pa. Superior, 475[2]), two lower court cases in New York and Pennsylvania involving the clause in a Mutual Life policy, which were decided before this court decided the question in the Stroehmann case the other way (Mutual Life Insurance Co. v. Union Trust Co., 280 N. Y. S. 217 and Mutual Life Ins. Co., v. McConnell, 20 D. & C. 250) and cases involving policies of other life insurance companies where the language was not the same. Honest and capable judges, striving, as did the other judges which passed upon the question, to determine the meaning of

---

[1] "Two main issues were involved: (1) Were the statements contained in the application false and made to deceive, or, if false, did they materially increase the risk? (2) Was their falsity waived by the appellee with knowledge of the appellant's condition by the acceptance of the premiums on the policy in August, 1929, and August, 1930?" Kaffanges v. New York Life Ins. Co., 59 F. (2d) 475, 476.

[2] "It will be noted that the defense set up does not in any manner attack the validity of the policy itself, but alleges that the total disability occurred prior to the payment of the first premium, and therefore, came within the express provision 'that such total disability shall occur after the payment of the first premium on this policy while the policy is in full force and effect. . . .'" Mayer v. Prudential Insurance Co., 121 Pa. Super. 475, 479.

the incontestability clause, have held that it does not save the defense of fraud against a part of the insurance contract or that, at any rate, it can be interpreted in two ways. The argument of weight of authority is irrelevant in such a case.

We do not rely upon the conflicting constructions and explanations of this clause by various counsel for the respondent, although we might do so. Neither do we depend upon the conflicting conclusions as to its meaning reached by many courts and upon the reams of bewildering and abstruse analyses and arguments to support them, although it would be logical if we did. We rest most confidently upon the fact that the average man, reading the policy which has been sold to him as incontestable, if he lives two years after it had been written and pays his premiums, when he reads the statement:

> "Incontestability — This policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits"

would believe that he has a policy such as he has been led to believe he will receive. The insurance company is at fault in so drafting the clause as to give the impression that the *policy* is incontestable except that a claim for the moneys promised may be contested if the premiums are not paid or if the insured, while disabled, is not permanently disabled, or, having been disabled, has recovered. A lawyer may stumble on the fact that this clause may be argued to mean what respondent says it means but it would take considerable explanation to a layman to make him see it.

Lots of learning and wisdom have been wasted by courts and counsel on the incontestability clause in a

Mutual Life policy but this court disposed of the matter very quickly in a few lines, easy to read and understand. We have shown the substantial similarity of the two clauses in our brief (pp. 9-11). To the average person, they are substantially alike, even if he does not make as detailed a comparison as we have made.

Respectfully submitted,

CHARLES J. MARGIOTTI,
CHARLES H. SACHS,

Counsel for Petitioners.

APPENDIX

January 22, 1938

Hon. George F. Morris,
Concord,
New Hampshire.

Dear Judge Morris:

RE NEW YORK LIFE INS. CO. v. MALLOY
EQUITY No. 306

I do not wish to further cumber the record with any extensive argument in reply to the respondents' reply brief on the question of incontestability. It seems to me that the respondents' argument introduces no new thought into the case and that it is completely answered by the section of our original argument on this question. I should like, however, to make one or two brief suggestions which I think may be of assistance to the court in arriving at a decision on this question.

The existence of the ambiguity which the respondents argue so hard and at such length to demonstrate could hardly have escaped the attention of the circuit court of appeals in the Kaffanges case and able counsel for the respondents in this case would never have had to wait for the complainant's argument on this question to discover it. The respondents' argument on this question will not bear critical analysis and is completely answered by a critical analysis of the language used. This is to be found in the quotations from the Pyramid case appearing at the top of page 20 and at the bottom of page 23 of our original argument. As pointed out in the quotation from the Deem case, pages 15 and 16, of our argument, the complainant when it drafted this clause was confronted with early decisions in the federal court and decisions in some of the state courts that failed to dis-

tinguish between "a denial of coverage and a defense of invalidity". It was confronted with the problem of drafting a phrase that would allow it to except the total disability and double indemnity provisions of the policy from the incontestability clause. It was also confronted with the problem of making it plain that its exception was broad enough to allow it not only to contest the validity of the policy in its inception but also to deny liability where recovery was sought for some injury or on some ground not covered by the total disability or double indemnity provisions. Having provided that the *policy* should be incontestable except as to the "provisions" relating to total disability and double indemnity, it was advisable if not necessary to add the word "conditions" to fully protect itself against misunderstanding, on the part of some court which might fail to distinguish between "a denial of coverage and a defense of invalidity". The respondents' argument entirely overlooks this situation, fails to note the very plain distinction between a provision that "this *policy* shall be incontestable . . . except *as to* provisions and conditions relating to disability and double indemnity benefits" and a provision that the policy shall be incontestable "except . . . *for* the restrictions and provisions *applying to* the double indemnity and disability benefits as *provided in Sections 1 and 3 respectively*". They wholly disregard the fact that the language used in the New York Life Insurance policy applies to all of the provisions and conditions relating to double indemnity and disability payments and that the language of the Mutual Life Insurance Co. policy applies only to the restrictions and conditions applying to the double indemnity and total disability provisions; and they completely turn their backs on the obvious fact pointed out in the Pyramid decision (see quotation at page 23 of your argument) that the provisions for payment and the conditions upon which such payments shall

be made (the promise to pay the benefits in question) appear on the face of the policy and are included in the New York Life exception as they are plainly excluded from the Mutual Life exception. As is so ably pointed out in the Deem and Pyramid cases any critical analysis of the language used makes this distinction plain and demonstrates the necessity for reaching opposite conclusions in cases involving the New York Life and the Mutual Life policies.

It should also be noted that the respondents' hope that the denial by the supreme court of a petition for certiorari in the Kaufman case must demonstrate that the supreme court thought that there was no conflict of opinion between the different circuits on an important question of law, is completely answered by the simple statement that at the time of the decision in the Kaufman case, the Stroehmann, Pyramid, Deem and Ruhlin cases had not been decided. The same is true of the Truesdale, the Yerys, and the Horwitz decisions referred to at page 575 of the opinion in the Deem case where the circuit court of appeals for the Fourth Circuit points out as did the circuit court of appeals for the Third Circuit in the Ruhlin case that the Stroehmann case resolved the conflict in federal judicial opinion and indicated the validity of the New York Life exception.

The respondents are attempting to invoke a rule of strict construction originally developed to protect the beneficiaries of innocent policyholders. They are asking the court to apply it to preserve to the respondent, Edward T. Malloy, benefits obtained by fraudulent misrepresentations. It must be apparent that this rule is not to be extended to such a situation or for such a purpose unless the ambiguity is plainly apparent. In the language of the Deem case quoted at page 23 of our argument: "While ambiguities which fairly exist in insurance poli-

cies must be resolved in favor of the insured, it is not permissible for courts by a strained and over-refined construction of ordinary words to create an ambiguity which would not otherwise exist".

We do not care to be heard further.

Very truly yours,

DEMOND, WOODWORTH, SULLOWAY, PIPER & JONES

By Jonathan Piper.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NO. 596.

JOHN G. RUHLIN, JENNIE B. RUHLIN, et al.,
Petitioners,

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

MEMORANDUM FOR RESPONDENT.

LOUIS H. COOKE,
WILLIAM H. ECKERT,
Counsel for Respondent.

1025 Union Trust Building,
Pittsburgh, Pennsylvania.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT STREET, PITTSBURGH, PA.

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MEMORANDUM FOR RESPONDENT.

Being thoroughly convinced of the correctness of the decisions of the District Court and the Circuit Court of Appeals in this case and in view of the opinion of this Court in *Stroehmann v. Mutual Life Ins. Co.*, 300 U. S. 435, we raise no objection to the granting of a writ of certiorari in order that this Court may have an opportunity to rule directly upon the incontestable clause of the respondent and express its disapproval of the decisions of the Circuit Court of Appeals for the Ninth Circuit in *New York Life Ins. Co. v. Kaufman*, 78 F. (2d) 398, and for the Fourth Circuit in *New York Life Ins. Co. v. Truesdale*, 79 F. (2d) 481, which we believe to be erroneous.

Respectfully submitted,

LOUIS H. COOKE,
WILLIAM H. ECKERT,
Counsel for Respondent.

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BRIEF FOR RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

LOUIS H. COOKE,
WILLIAM H. ECKERT,
Counsel for Respondent.

1025 Union Trust Building,
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SUBJECT INDEX.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The Circuit Court of Appeals wrote two opinions in this case. The first, which has not been reported, appears in the record at pages 25 to 31. The opinion after re-argument appears in the record at pages 39 to 43, and is reported in 93 F. (2d) 416. The opinion of the District Court appears in the record at pages 17 to 19.

STATEMENT OF THE CASE.

This is a suit in equity by a mutual life insurance company to cancel and eliminate from five policies issued by it the disability and double indemnity benefit provisions. The ground for the rescission is that the insured

falsely and fraudulently answered material questions in the application for each policy regarding his prior health and treatments by physicians (R. 5). The five policies involved are all ordinary life insurance policies, but each also contains on its front page a promise to pay double the face of the policy in case of accidental death of the insured and also a provision for payment of monthly income and waiver of premiums if the insured becomes totally and presumably permanently disabled (R. 8-9). What is meant by accidental death and by total and presumably permanent disability is defined on the second page of each policy, and detailed conditions are also set forth there affecting those benefits in various ways (R. 9-12).

The total premium includes specified amounts charged in respect of the disability and double indemnity benefits. For example, the policy which is printed in the record contains the following (R. 9):

> "(The above premium includes $5.20 for the Double Indemnity Benefit and $19.30 for the Disability Benefits.)"

Each policy also provides that the insured may discontinue the double indemnity or disability benefit or both on any anniversary of the policy and obtain a reduction in the premium equivalent to the amount charged for such benefits (R. 10-12). Thus, with reference to double indemnity each policy provides as follows (R. 10):

> "Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for the Double Indemnity Benefit."

Each policy also contains what is known as an incontestability clause reading as follows (R. 12):

> "This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

Two of the policies were issued on December 1, 1928, and the other three on July 7, 1930. The petitioner, John G. Ruhlin, is designated as the insured in each policy and the other four petitioners are the beneficiaries.

The respondent offers to refund, with interest, all premiums received by it on account of the disability and double indemnity benefits provided by the policies (R. 6). Said sum, amounting to $1,045.42, has been paid into the District Court by the respondent.

The petitioners are residents of Pennsylvania and the respondent is incorporated under the laws of the State of New York (R. 2).

The District Court, after hearing, granted a preliminary injunction restraining the petitioners from instituting or prosecuting any proceeding upon said policies or from assigning any rights thereunder or changing the beneficiary or beneficiaries thereof, pending the outcome of this case. The petitioners moved to dismiss the bill and to dissolve the restraining order. Those motions were overruled (R. 19). The petitioners appealed.

The Circuit Court of Appeals after re-argument affirmed the decree of the District Court in its entirety (R. 43). The Circuit Court of Appeals in both of its opinions agreed with the District Court that the incontestable clause quoted above did not bar the respondent from at-

tempting to prove that fraud had been perpetrated upon it in the procurement of the insurance and that the double indemnity and disability provisions of the policies should, therefore, be rescinded (R. 27-28, 40-41). At the first argument before the Circuit Court of Appeals, that Court was composed of Circuit Judges Davis and Thompson and District Judge Watson (R. 25). At the re-argument, the Circuit Court was composed of Circuit Judges Buffington, Davis and Thompson (R. 39).

The only question raised is whether the incontestable clause quoted above bars a contest of the disability and double indemnity provisions more than two years after the date of issue of the policies.

ARGUMENT.

SUMMARY.

The plain provisions of the policy should be given effect.

The disability and double indemnity benefits are specifically exempted from the operation of the incontestability clause. This is demonstrated by logic and reason and is supported by the weight of authority.

The petitioners' contention would deprive the exception to the incontestable clause for the provisions relating to disability and double indemnity benefits of any effect. The law requires every word in a contract to be given some effect, if at all possible.

I.

General Approach.

The petitioners rely upon the doctrine that in case of ambiguity an insurance policy is to be construed most strongly against the company which wrote it. Referring to this rule, this Court said in *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, 492:

> "* * * but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings.
>
> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense. *Imperial Fire Ins. Co. v. Coos County,* 151 U. S. 452, 462-463."

With specific reference to an incontestable clause in an insurance policy, this Court by Mr. Justice Cardozo, in *American Life Ins. Co. v. Stewart,* 300 U. S. 203, 215, uttered the following note of caution:

> "To make a contract incontestable after the lapse of a brief time is to confer upon its holder extraordinary privileges. We must be on our guard against turning them into weapons of oppression."

II.

Consideration Upon Reason.

The decisions of the Courts below are supported by both reason and authority. Since the decided cases are not all harmonious, however, the question will be considered first from the standpoint of principle and reason.

In the first place, it is to be noted that each policy here involved is severable in the sense that the disability and double indemnity features may be discontinued while the life feature remains in force. Thus the first policy here involved (No. 10,452,365), after stipulating how much the semi-annual premium shall be and when due, continues as follows (R. 9):

> "The above premium includes $5.20 for the Double Indemnity Benefit and $19.30 for the Disability Benefits."

Similar provisions are found in each of the other policies except that the amount varies, which of course is immaterial.

Furthermore, each policy entitles the insured on any anniversary of the policy to terminate either the double indemnity or disability benefits, or both. If the insured so elects, a corresponding reduction in the premium is

expressly required. The last paragraph of the provisions relating to double indemnity is as follows (R. 10):

> "Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for the Double Indemnity Benefit."

A corresponding provision is found in the last paragraph relating to total and permanent disability, and is as follows (R. 12):

> "Any premium due on or after the anniversary of the Policy on which the age of the Insured at nearest birthday is sixty, will be reduced by the amount of premium charged for Disability Benefits. Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for Disability Benefits."

The above quoted provisions clearly show that the insured himself may delete the double indemnity or disability benefits from the policy and yet leave the ordinary life insurance in force. Indeed, after the insured reaches the age of 60, the disability benefits can no longer be continued but are absolutely required to be eliminated from the coverage. These considerations conclusively prove that the policy is severable in the sense that the disability and double indemnity features may be terminated while the life feature is continued in force. There is therefore no reason why a court may not decree cancellation of the disability and double indemnity benefits even though the rest of the policy remains in force.

The meaning of the incontestable clause contained in each of the policies here involved is, we submit, clear and unambiguous. The plain intention is to take the provisions relating to disability and double indemnity benefits out of the operation of the incontestable clause. The petitioners' argument resolves itself to this, that the second exception in the incontestable clause (excepting the provisions and conditions relating to disability and double indemnity benefits) should apply only to facts which occur after the policy is issued, or, in other words, that the second exception is merely to enable the company to defend itself against claims growing out of risks which are not covered by the policy and were, therefore, not assumed by the insurer. Such a construction of the incontestable clause is untenable. The only purpose of an incontestable clause is to bar defenses which attack the *validity* of the contract. Obviously, an incontestable clause is not intended to enlarge the *coverage* of a policy, by precluding the company from defending against a claim which is based on a loss against which no insurance was purchased or undertaken. Consequently, no exception to the incontestable clause would be needed to enable the insurer to contest a claim for double indemnity on the ground that the death was not accidental or to contest a claim for disability benefits on the ground that the insured was not totally and presumably permanently disabled as required by the policy. For example, the double indemnity is expressly made payable only in the event of accidental death, and the double indemnity provision expressly stipulates "Double Indemnity shall not be payable if the Insured's death resulted from self-destruction" (R. 9). It is clear under this language that double the face of the policy would never become payable unless the insured met an accidental death, and would not be payable if he committed suicide, regardless of whether the death

occurred more or less than two years after the issuance of the policy. No exception to the incontestable clause is needed to reach that conclusion. Yet counsel for the petitioners contend that the contrary is true and that the sole and only purpose of the exception to the incontestable clause for the provisions and conditions relating to disability and double indemnity benefits is to enable the insurer to insist upon the contingencies actually occurring, such as accidental death, which must happen in any event in order to create or sustain the loss insured against. To give the incontestable clause the construction for which the petitioners are contending would therefore deprive the phrase "except as to provisions and conditions relating to Disability and Double Indemnity Benefits" of any effect. It is, of course, elementary that a contract is to be construed so as to give effect to all of its words and terms and not so as to render some of them nugatory and void: *2 Cooley's Briefs on Insurance,* 963.

The gist of the petitioners' argument is stated in their brief as follows (p. 6):

> "As drawn by the insurer, the exceptions to incontestability, contained in the clause, reserve the right to defend only for matters occurring subsequently to the issuance of the policy, such as nonpayment of premium and matters intending to show that a claim for double indemnity or disability benefits made under the policy does not come within the provisions and conditions relating to such benefits contained in the policy."

To test the soundness of the contention of the petitioners, let us begin by asking a few questions. If the second exception were not in the incontestability clause, could it be held that the company would be estopped, after two years from the date of issue of the policy, from raising any defense against a claim for disability bene-

fits or double indemnity? If the second exception were not in the incontestability clause, could it be held that the company was liable for disability benefits, without being given the opportunity to prove that the insured was not disabled? If the second exception were not in the incontestability clause, could it be held that the company was liable for double the face of the policy, without being given a chance to prove that the death was not accidental? Of course not. No exception in the incontestability clause is needed to permit the insurer to raise such defenses. To construe the second exception in the incontestability clause as contended for by the petitioners would nullify that exception and render it useless, but, as is abundantly established by the authority cited above, a policy of insurance like every other contract is to be construed so as to give every phrase or clause, if possible, some meaning and effect. The only way the second exception in the incontestability clause can be given effect is by applying it to defenses which would otherwise be barred by the incontestability clause, and not by the useless gesture of applying it to defenses which could be raised even if the second exception were not in the incontestability clause. Accordingly, the only way the second exception in the incontestability clause can be given effect is by applying it to defenses which result in a contest of the validity of the policy. That is the only kind of defense to which an incontestability clause is intended to apply, and therefore the exception in that clause is intended to apply to similar defenses, viz., those which attack the policy's validity. An incontestability clause was never intended to apply to defenses that might accrue or events that might happen after the policy was issued. The purpose of an incontestability clause is to give the insurer a limited time from the date of issue of the policy to investigate whether the insurance embraced within such incontesta-

bility clause is voidable for any reason. Obviously the insurer could not during such limited time learn of defenses that it might only acquire in the future by reason of subsequent events. Since, then, an incontestability clause applies only to defenses which existed when the policy issued, or which attack the validity of the contract, the exception to that clause could only apply to defenses of a similar character, such as fraud in the procurement of the insurance.

That an incontestability clause is not intended to apply to defenses that might accrue or events that might happen after the policy is issued, which do not contest the validity of the contract but go only to the denial of coverage, appears from a case cited by the petitioners themselves: *Mayer v. Prudential Ins. Co.,* 121 Pa. Superior Ct. 475, 184 A. 267. It is there said (p. 479):

> "The real purpose of an incontestable clause is to prevent any defense which may be raised by the insurance company against the validity of the policy, such as fraud, misrepresentation and condition of health arising in connection with the issuance of the policy; but as to such provisions and conditions as necessarily must relate to matters which arise after the issuance of a policy and which do not affect the validity of the policy itself, the incontestable clause has not been applied. In Brady v. Prudential Ins. Co., supra, at page 650, in an opinion by Justice Williams, the court said: 'The provision in the ninth clause (the incontestable clause) which was relied upon to show that the policy was incontestable did not amount to a confession of judgment. It did not deny to the company the right to defend against an action brought upon the policy, except in so far as the defense might rest on a denial of the validity of the policy itself. All other lines of defense remained

open to it.' In Hall v. Life Assn., 19 Pa. Superior Ct. 31; Collins v. Metropolitan Life Ins. Co., 27 Pa. Superior Ct. 353; Sargeant v. Insurance Co., 189 Pa. 341, 41 A. 351; Doll v. Prudential Ins. Co., 21 Pa. Superior Ct. 434; McCreighton v. American Catholic Union, 71 Pa. Superior Ct. 332; Ludwinska v. John Hancock Mutual Life Ins. Co., 317 Pa. 577, 178 A. 28; Robinson v. Metropolitan Life Ins. Co., 69 Pa. Superior Ct. 274; Starck v. Union C. L. Ins. Co., 134 Pa. 45, 19 A. 703, it was held that the incontestable clause does not apply to risks not assumed by the policy."

In their brief, the petitioners say (p. 6):

"The purpose of an incontestable clause in a life insurance policy is, concededly, to bar the defense of fraud in procuring the insurance after a certain period."

If the incontestability clause is intended only to cut off inquiry into the truth of the statements made by the assured in the application and to preclude any question concerning the original validity of the policy after the contestable period has expired, it is clear that the incontestability clause would not apply to the defenses of suicide, self-inflicted injury or absence of total and permanent disability. The exception in the incontestability clause can only be given effect by applying it to defenses which would but for that exception come within the incontestability clause. In brief, the petitioners while admitting that the incontestable clause applies only to matters which occurred *before* the policy was issued, seek to limit the exception in the incontestable clause to matters which occur *after* the policy is issued. The argument of those seeking a reversal of the Courts below is illogical on its face.

The petitioners confuse two entirely distinct things: one is the coverage or risks assumed by a policy; the other is that after a specified period the policy shall be incontestable for any reason involved in the issuance of the policy and going to its validity. That a policy may be free from contest as to its validity does not extend the coverage or risks insured against. Because a life insurance policy has become incontestable does not mean, for example, that the insurer is precluded from contesting a claim on the ground that the insured is not dead but still alive. The incontestable clause means that the company may not assert that the policy is not valid. The incontestable clause does not mean that the insurance company agrees to waive the right to defend itself against a risk which it has never contracted to assume. Were it otherwise, it could with equal logic be said that after the contestable period has expired a life insurance policy could be used to cover a loss of property by fire. Of course that conclusion is ridiculous. It serves, however, to contrast the difference between the coverage of a policy or risks assumed on the one hand and the effect of the incontestability clause on the other hand. This distinction has been recognized in *Mack v. Conn. General Life Ins. Co.*, 12 F. (2d) 416 (cert. den. 271 U. S. 687); *Sanders v. Jefferson S. Life Ins. Co.*, 10 F. (2d) 143; *Hearin v. Standard Life Ins. Co.*, 8 F. (2d) 202; *Mutual Life Ins. Co. v. Kelly*, 114 Fed. 268; *Starck v. Union Central Life Ins. Co.*, 134 Pa. 45, and *Hall v. Mutual Reserve Fund Life Asso.*, 19 Pa. Superior Ct. 31. In the first of the cases cited, the Circuit Court of Appeals for the Eighth Circuit held there could be no recovery under a policy which expressly excepted death by suicide even though the death occurred after the period specified in an incontestable clause in the policy, saying (p. 418):

> "The contract provision expressly excluding the assumption of the risk of suicide for two years is

> entirely distinct from the incontestable clause, is consistent with it, and the one in no way contradicts the other. There is a distinction between facts which would warrant a rescission of the contract and a risk not covered by the contract. The incontestable clause relates to the former. The suicide clause relates to the latter."

In the second of the cases just cited, the Circuit Court of Appeals for the Fifth Circuit said (p. 144):

> "A provision for incontestability does not have the effect of converting a promise to pay on the happening of a stated contingency into a promise to pay whether such contingency does or does not happen. It cannot properly be said that a party to an instrument contests it by raising the question whether under its terms a liability asserted by another party has or has not accrued. The maker of a promissory note payable one year after date would not contest it by resisting an attempt to enforce it before it was due."

In the last of the cases cited above, the court, in holding that the insurer was liable only for return of premiums where the insured committed suicide after the expiration of the contestable period, said (p. 35):

> "It (the incontestable clause) does not convert an exception of any risk into an assumption of it, or bar defense to a claim on a risk not assumed. It gives no warrant for reading into the contract a liability expressly excepted from it."

To the same effect Mr. Justice Cardozo when Chief Justice of the Court of Appeals of New York, in *Metropolitan Life Ins. Co. v. Conway,* 252 N. Y. 449, 169 N. E. 642, said (p. 452):

> "The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage, the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken. Like questions have arisen in other jurisdictions and in other courts of this State. There has been general concurrence with reference to the answer (" citing cases).

Conditions subsequent which forfeit a policy and render it void are seldom found in modern life insurance policies, and to the best of our knowledge there never were any such conditions in disability and double indemnity provisions. Certainly there are no such conditions in the disability and double indemnity provisions now before this Court.

So also the Supreme Court of Pennsylvania in *Elwood v. New England Mutual Life Ins. Co.*, 305 Pa. 505, 158 A. 257, held that there could be no recovery for disability resulting from self-inflicted injuries, even though the incontestable clause contained no exception whatever relative to the disability provisions and the injuries were not inflicted until after the contestable period had expired.

To deny that the insured is dead or that his death was not accidental or that he is not totally and permanently disabled, would not be contesting the policy. The validity of the policy would be admitted, and the only contest would be as to whether the facts showed that the loss insured against had been sustained. A reliance upon the terms of the contract does not contest its validity, but assumes it. Thus in *Sanders v. Jefferson Standard Life Ins. Co.*, 4 F. (2d) 555, the court said (p. 558):

"An incontestable clause in a policy of insurance providing for one of two or more benefits in case of death, accident, or disability cannot be construed to prohibit the company from showing the particular alternative or disconnected benefit which the insured is entitled to receive. The defendant is not contesting the policy by showing facts that determine which of separate, but not necessarily cumulative, provisions of the policy apply."

To the same effect is *Wright v. Phila. Life Ins. Co.*, 25 F. (2d) 514. A well considered case is *Myers v. Liberty Life Ins. Co.*, 124 Kan. 191, 257 Pac. 933, 55 A. L. R. 542, in which the Supreme Court of Kansas held that there could be a recovery for premiums only where the insured committed suicide after the expiration of the contestable period. The court, in reasoning to its conclusion, said (p. 194):

"Suppose that, under the heading 'General Provision,' the policy provided the company would pay double the face amount if death resulted from accident occurring within two years from the date of issue. Nobody would say such a provision rendered the policy ambiguous with respect to extent of liability, if the contingency occurred, and if in an action to recover on the policy the company should deny double liability on the ground the insured did not die as the result of accident, it could not be urged successfully that the company was contesting the policy."

The incontestability clause has been frequently characterized as a short statute of limitations, giving the insurer a limited period within which to investigate any grounds for questioning the validity of the policy: *Mack v. Conn. General Life Ins. Co., supra; Brady v. Prudential Ins. Co.*, 168 Pa. 645, 649; *Lawler v. Home Life Ins. Co.*, 59 Pa. Superior Ct. 409; *4 Amer. & Eng. Ann. Cases*

364. A statute of limitations necessarily can apply only to a past event. It may therefore apply to the time within which an insurer may contest a policy on the ground that its issuance was induced by false representations. But how could an insurer investigate whether the insured will commit suicide? How could it be told within two years of the issuance of a policy whether the insured might years later destroy or injure himself, or whether he at some equally remote future time might become totally disabled? Yet that is what the petitioners contend. They say it is solely to enable the insurer to raise such defenses as suicide, self-inflicted injury or absence of total and permanent disability after the contestable period has expired that the second exception is inserted in the incontestable clause. Manifestly that is not so, because the incontestability clause would not bar such defenses even without any such exception in it. The second exception in the incontestability clause was not inserted for nothing. It can only be given effect by applying it to what would otherwise be barred by the incontestability clause, viz., fraud in the procurement of the disability and double indemnity insurance.

In this connection, it is also not to be overlooked that the proviso under consideration to the incontestable clause begins as follows: "except as to provisions" relating to disability and double indemnity benefits. This language is as broad as any conceivable. The exception is not confined to some provisions only relating to disability and double indemnity benefits. The word "provisions" without any qualification or limitation naturally refers to and includes all and everything that pertains to the disability and double indemnity features. Even if the word "conditions" in the exception were construed to refer to what the petitioners contend, the word "provisions" is also present and must be given effect. The word "provisions," it is submitted, can only be given ef-

fect by excepting from the operation of the incontestable clause everything in the policy relating to disability and double indemnity benefits, including the basic covenants to pay such benefits contained on the front page of each policy.

The petitioners argue that the words "provisions" and "conditions" are to be treated as synonymous. The contrary is shown, however, by the fact that the conjunction "and" connects those two words. If the word "conditions" were used as synonymous with "provisions," the phrase should read "except as to the provisions, or conditions, relating to Disability and Double Indemnity Benefits," or "except as to the provisions, the conditions, relating to Disability and Double Indemnity Benefits." Instead, the phrase reads "except as to provisions and conditions relating to Disability and Double Indemnity Benefits" (R. 12). The thought conveyed by the language actually used, therefore, is that the two words are not merely synonymous.

The fact that non-payment of premium is excepted from the incontestable clause does not, of course, mean that the other exception to the incontestable clause shall be confined to matters occurring in the future. The two exceptions are completely independent and distinct (R. 12). Even if the exception in the incontestability clause of the provisions relating to disability and double indemnity benefits might also be applied to events occurring after the issuance of the policy, such as death of the insured by suicide or in an airplane crash (the latter being also a risk specifically excepted from the double indemnity benefit), still that is no reason why that exception should not also be applied to events which occur before the issuance of the policy, in so far as they affect the disability and accidental death insurance. Further-

more, the first exception to the incontestable clause also applies to an event which must occur before the insurance goes into effect, namely, payment of the first premium. A provision in the application, which becomes a part of the contract, expressly stipulates "That the insurance hereby applied for shall not take effect unless and until * * * the first premium thereon (is) paid in full." This provision is omitted from the printed record.

Likewise, the second exception in the incontestable clause should not be limited to meeting the few cases, none of which is cited by the petitioners, and all of which but one are distinguishable or have been overruled, which the petitioners say hold "that the incontestable clause bars defenses for future occurrences." Even if the exception of the provisions relating to disability and double indemnity benefits could be used to meet those cases, which it never has been so far as we have been able to find, that exception could also with proper consistency be applied to events which had occurred before the policy was issued, in so far as those prior events affected the validity of the disability and double indemnity insurance. The plain import of the clause excepting the provisions relating to disability and double indemnity should not be restricted to something illogical when it is also applicable to prior events and logically is most pertinent to them. This argument of the petitioners was also rejected in *Equitable Life Assur. Soc. v. Deem,* 91 F. (2d) 569, 572, and in *Guardian Life Ins. Co. v. Barry,* 10 N. E. (2d) 614, 618 (Ind.), discussed hereinafter.*

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* Cases specifically deciding that risks not assumed by a policy will not be covered even after the expiration of the contestable period are: *Mack v. Conn. General Life Ins. Co., supra; Sanders v. Jefferson S. Life Ins. Co., supra; Hearin v. Standard Life Ins. Co., supra; Mutual Life Ins. Co. v. Kelly, supra; Starck v. Union Central Life Ins. Co., supra; Hall v. Mutual Reserve Fund Life Asso., supra; Metropolitan Life Ins. Co. v. Conway, supra; Elwood v. New England M. Life Ins. Co., supra;*

A fundamental error in the argument of the petitioners is that they assume that what appears on the second page of each policy consitutes the whole of the provisions and conditions relating to disability and double indemnity benefits, when in fact that is not so. Thus, in their brief, the petitioners immediately after quoting the incontestable clause say (pp. 4-5): "The provisions and conditions relative to 'Disability and Double Indemnity Benefits' in said policies provide they shall be payable upon receipt of proof, and, as relates to double indemnity, that the benefits shall be payable only if death resulted in a particular manner and not if it resulted from self destruction, etc., etc., and, as relates to disability benefits, that they shall be payable only if the insured is through injury or disease wholly prevented from performing any work, etc., * * *"

The petitioners completely ignore the main covenants to pay disability and double indemnity benefits, which appear on the first or front page of each policy (R. 8). The main provision concerning disability benefits is the promise of the company to pay 1% of the face of the policy monthly and to waive premiums if the insured becomes totally and presumably permanently disabled. Correspondingly, the main provision concerning the double indemnity benefit is the company's promise to pay double the face of the policy if the insured's death results from accident. These main provisions, which appear on the face of each policy, clearly are embraced within the meaning of the word "provisions" in the exception to the incontestable clause. The other provisions

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Wright v. Phila. Life Ins. Co., supra; Myers v. Liberty Life Ins. Co., supra; Flannagan v. Provident Life & A. Ins. Co., 22 F. (2d) 136 (C. C. A. 4); *Ferrand v. N. Y. Life Ins. Co.*, 69 F. (2d) 159 (C. C. A. 8) and *Howe v. N. Y. Life Ins. Co.*, 2 F. Supp. 242 (D. C. Cal.), and many other cases cited in them.

which the petitioners mention are merely the details which supplement the basic promises contained on the first page of the policy. There is manifestly not sufficient room on the face of a policy to set forth all of the detailed provisions and conditions which particularize the disability and double indemnity benefits. Obviously, that is no reason for limiting the provisions referred to in the incontestable clause to those which appear on the second page of the policy. The petitioners would have the exception in the incontestable clause read "except as to provisions and conditions contained on page two hereof relating to disability and double indemnity benefits." In fact, however, the words "contained on page two hereof" do not appear in the incontestable clause now before the Court. Nothing is in the incontestable clause to limit the provisions as to disability and double indemnity benefits which are excepted, and therefore *all* such provisions are removed from the operation of the incontestable clause.

The petitioners emphasize that "fraud in procuring the policy is not included" in what is set forth on the second page of each policy. How many times has any one ever seen a provision in a contract that it should be void if fraud was practiced in obtaining it? Not only would such a stipulation be extraordinary, but it would also be wholly unnecessary. The law itself renders every contract voidable for fraud in its inducement, without the help of any provision to that effect in the contract.

The legislatures of Pennsylvania and New York have used almost the same language as is found in the second exception to the incontestable clause now before this Court, viz., "provisions relative to disability and double indemnity benefits." The Pennsylvania insurance code of 1921, P. L. 682, § 410 (c), as last amended

by the Act of 1935, P. L. 1020, which requires an incontestable clause in every life policy, ends as follows:

> "provisions relative to benefits in the event of total and permanent disability, and provisions which grant additional insurance specifically against death by accident, may also be excepted."

The New York statute is identical (N. Y. Insurance Law § 101). Evidently the legislators thought that language was free from ambiguity.

Concluding this consideration of the question as one of novel impression, it is respectfully submitted that the incontestable clause applies only to the validity of the policy. Whether the death of the insured was accidental or whether he has become totally and permanently disabled so as to render the insurer liable for double indemnity or disability benefits, respectively, manifestly does not go to the validity of the policy. Accordingly no exception to the incontestable clause would be necessary to enable the insurer to contest whether the death was accidental or whether the insured is totally and permanently disabled. The only purpose and effect that can be given to the second exception in the incontestable clause is to permit the double indemnity and disability benefit provisions to be contested at any time on the ground of their validity because of fraud in the application for the insurance, even though the contestable period as to the ordinary life insurance feature of the policy has expired. At any rate, even if the incontestable clause is also applied to events which occur after the policy is issued, the exception of the disability and double indemnity benefits can and should extend to events which occurred before the policy was issued.

III.

Consideration Upon Precedent.

Passing to a review of the authorities on the subject, it will be found that the weight of them in numbers, and in soundness too, we submit, supports the decisions of the Courts below.

In *Stroehmann v. Mutual Life Ins. Co.*, 300 U. S. 435, this Court expressly recognized that the incontestable clause involved in the case at bar is different from that which is used by The Mutual Life Insurance Company. To that effect, this Court there said (p. 440):

> "The Circuit Court of Appeals followed its earlier opinion in *N. Y. Life Ins. Co. v. Gatti,* (Oct. 6, 1936), *where the company employed different language.* Certain life companies undertake to make exceptions to the Incontestability clause by words more precise than those now under consideration, and opinions in cases arising upon their policies must be appraised accordingly." (Italics added).

The opinion referred to in the foregoing excerpt as that in *New York Life Ins. Co. v. Gatti,* is the one which appears in the record in this case at pages 25 to 31. The *Gatti* case and the case at bar were companion cases in the District Court, and in the Circuit Court of Appeals until after the first opinion of the Circuit Court had been filed. Both cases involved the same questions and were disposed of together. Pending the re-argument, the insured in the *Gatti* case died and that case was then settled.

The Mutual Life Insurance Company expressly limits the "restrictions and provisions applying to the Double Indemnity and Disability Benefits" which are

excepted from its incontestable clause to those set forth "in Sections 1 and 3 respectively" of its policy. The New York Life Insurance Company, in its incontestable clause, does not limit the excepted provisions to those set forth in particular sections of the policy, nor indeed to any part of the provisions and conditions relating to disability and double indemnity benefits, but excepts *all* of them, including the basic promises on the face of its policy, affirmatively creating the obligations to pay disability and double indemnity benefits. The exception in the incontestable clause of The Mutual Life Insurance Company being expressly confined to Sections 1 and 3 of its policy, does not apply to the basic promises of that company to pay disability and double indemnity benefits, because those basic promises are not contained in Sections 1 and 3, on the inside pages of its policy, but appear on the face of the policy.

In the words of this Court, the respondent in the *Gatti* and *Ruhlin* cases "employed different language" from that used by The Mutual Life Insurance Company. Evidently the respondent was one of the companies referred to by this Court which makes "exceptions to the incontestability clause by words more precise than those now under consideration," *i. e.*, in the *Stroehmann* case.

Judge Watson distinguished between the incontestable clauses of The Mutual Life Insurance Company and of the New York Life Insurance Company. It was he who decided the *Stroehmann* case in the District Court, and whose decision there was reinstated by this Court. He was also one of the judges who concurred in the original opinion in the case at bar filed on October 6, 1936, holding that the New York Life Insurance Company's incontestable clause excepted the disability and double indemnity benefits from its operation (R. 25).

The Circuit Court of Appeals for the Fifth Circuit is in accord with the Third Circuit: *Pyramid Life Ins. Co. v. Selkirk,* 80 F. (2d) 553. That case is on all fours with the one at bar and involved an incontestable clause reading as follows: "This policy shall be incontestable after one year from date of issue, except for the non-payment of premiums or violation of its terms as to military or naval service in time of war, and except as to provisions and conditions relating to disability benefits and those granting additional insurance specifically against death by accident, if any."

Holding that the company was entitled to rescission of the disability provisions on account of fraud, notwithstanding that the policy had been issued more than one year, the Circuit Court of Appeals for the Fifth Circuit said (p. 554):

> "The expression, 'provisions and conditions relating to disability benefits,' even if tautological, embraces all matters relating to liability for such benefits; those which create the right to receive them, as well as those which will defeat the right. When the terms 'provisions' and 'conditions' are combined, nothing else relating to liability for disability benefits remains to be referred to, and both are excepted from the operation of this incontestability clause. It might have been briefer to have said, as suggested by appellee, that the policy is incontestable after one year 'except as to liability for disability benefits.' But it would have been no more comprehensive. Moreover, one of the 'provisions' relating to disability benefits is the promise of the insurer to pay them, made in reliance upon the insured's application which forms a part of the policy and in which the false representations are alleged to have been originally made. The 'provision' containing this promise is excluded from the protection of the incontest-

> ability clause and leaves such promise open to rescission for fraud in its procurement."

The Circuit Court of Appeals for the Fifth Circuit also said in that case that the incontestable clause of the Equitable Life Assurance Society was similar to that before it, which is substantially identical with that used by the New York Life Insurance Company, and distinguished the incontestable clause used by The Mutual Life Insurance Company.

The Circuit Court of Appeals for the Sixth Circuit is also in accord with the Courts below: *Connecticut General Life Ins. Co. v. McClellan,* decided February 8, 1938, and not yet reported. That was a suit in equity brought by the insurer to cancel the disability provisions of a policy on the ground of fraud by the insured in the application for the policy. The policy provided that it should be incontestable after it had been in force for two years, except for non-payment of premium and "except as to provisions and conditions relating to benefits in the event of total and permanent disability." There was a motion to dismiss the bill on the ground that the incontestable clause barred the relief sought, the policy having been issued for more than two years. The Circuit Court of Appeals for the Sixth Circuit held that this motion should be overruled and that the case should go to a hearing on its merits. After referring to *Stroehmann v. Mutual Life Ins. Co., supra,* and *Ness v. Mutual Life Ins. Co.,* 70 F. (2d) 59, Judge Moorman for the Court said:

> "The language in the policy here in controversy is entirely different. It is unambiguous, clear, so clear that, in our opinion, to argue the point would be an attempt to overclarify it."

No argument is needed, we believe, to show the similarity between the incontestable clauses of the Con-

necticut General Life Insurance Company and the respondent. The general construction of each is the same; each first excepts therefrom non-payment of premium; and then both proceed with the identical language "except as to provisions and conditions relating to" disability benefits.

The Circuit Court of Appeals for the First Circuit is also in accord with the Courts below. Cancellation of the disability benefits for fraud in the procurement of the policy was granted in *Kaffanges v. New York Life Ins. Co.*, 59 F. (2d) 475. In that case, as here, more than two years had elapsed since the policy was issued, and accordingly no attempt was made to rescind the life feature of the policy. The same form of policy was involved in that case as in the case at bar. The fact that the relief prayed for was decreed demonstrates that the disability and double indemnity benefits may, in the opinion of the Circuit Court of Appeals for the First Circuit, be rescinded while the life feature of the policy is continued in force. The Court in that case discharged the question with which we are now laboring in the following terse language (p. 476):

> "The policy was issued in August, 1926, and contained an incontestable clause as to death benefits, but not as to the disability provisions."

The United States District Court for the District of New Hampshire, is also in accord with the decisions below. In *New York Life Ins. Co. v. Malloy*, that Court had before it an equity suit brought by the insurer to rescind the disability and double indemnity benefits of four policies containing the identical incontestable clause which is now before this Court. Holding that this incontestable clause does not apply to the disability and double indemnity benefits, Judge Morris in his opinion filed on January 27, 1938, and which has not yet been reported,

after quoting from the opinion of this Court in *Stroehmann v. Mutual Life Ins. Co., supra,* said:

> "It should be noted that the language in the Stroehmann case is identical with the language in the Ness case heretofore cited. It is apparent from the above opinion of the Supreme Court that the excepting clause in each policy of insurance must be construed in accordance with its language and the fair meaning expressed and if the language is not ambiguous, the principle that it will be construed most favorably to the insured is not applicable."

After considering the opinion in *New York Life Ins. Co. v. Kaufman,* 78 F. (2d) 398, heavily relied upon by the petitioners, Judge Morris said:

> "I am not prepared to follow the Kaufman case and I hold that the complainant in the case at bar is not precluded by the incontestability clause in the policy from obtaining rescission of the double indemnity and disability clauses for fraud or material misrepresentation practiced by the insured at the inception of the contract."

The Pennsylvania law is in accord with the decisions below: *Guise v. New York Life Ins. Co.,* 127 Pa. Superior Ct. 127, 191 A. 626 (1937). In that case, it was specifically decided that the identical incontestable clause now before this Court does not apply to the disability provisions contained in the policy. That was a suit brought by the insured for disability benefits, and one of the insurer's defenses was that false answers had been made by the plaintiff to questions in the application for one of the policies. The portion of the opinion dealing with the effect of the incontestable clause is as follows (p. 133):

"During the course of the trial counsel for appellee questioned the right of appellant to inquire into 'matters relating to things prior to the issuance of the insurance policies' in view of the 'incontestability clause' in each. The learned trial judge, Davison, P. J., specially presiding, correctly ruled that the incontestability clauses did not apply 'to the provisions and conditions relating to disability * * * benefits.' An examination of the clauses discloses that the disability provisions of the policies are expressly excluded from their operation."

The New York courts have repeatedly ruled upon the precise question now under consideration and have uniformly decided it in accord with the Courts below: *Conn. General Life Ins. Co. v. Brandstein,* 233 App. Div. 723, 249 N. Y. S. 1018; *Chambers v. New York Life Ins. Co.,* 148 Misc. 561, 265 N. Y. S. 217, affirmed in 240 App. Div. 1027, 268 N. Y. S. 994; *Conn. Mutual Life Ins. Co. v. Hirsch,* 240 App. Div. 816, 266 N. Y. S. 950; *Guardian Life Ins. Co. v. Katz,* 243 App. Div. 11, 275 N. Y. S. 743, affirmed in 269 N. Y. 625, 200 N. E. 29; *Mutual Life Ins. Co. v. Union Trust Co.,* 280 N. Y. S. 217. In the *Chambers* case, in which this same insurance company sought to rescind that part of an identical policy which provided for disability and double indemnity benefits, the court, in rejecting the insured's argument that the relief sought by the company was barred by the incontestable clause, said (265 N. Y. S. 217):

"The policies specifically except the incontestability for double indemnity and disability."

Judge Black for the court in that case also said (p. 218):

"It will be observed that the policy in suit specifically shows the charge each year for double indemnity and disability benefits, so that it is not only possible but practicable to terminate the benefits for which

> the plaintiff paid in the event that a final determination shall find that fraud and misrepresentation were practiced upon the defendant."

The highest court of New York State is also in accord with the Courts below with reference to the identical form of policy involved in the instant case: *Steinberg v. New York Life Ins. Co.*, 263 N. Y. 45, 188 N. E. 152. That was an action by the insured for disability benefits. The defense was that the plaintiff had falsely answered questions in the application regarding his prior health. More than two years had elapsed between the issuance of the policies and the bringing of this suit. The Court of Appeals of New York nevertheless held that the defense should have been admitted. The Court of Appeals said (p. 47):

> "The two year incontestability clauses contained in the policies prevent any defense as to the ordinary life insurance provisions in the policies, but do not apply to the disability and double indemnity benefits."

In *Manhattan Life Ins. Co. v. Schwartz*, 274 N. Y. 374, 9 N. E. (2d) 16, and *Equitable Life Assur. Soc. v. Kushman*, 276 N. Y. 178, 11 N. E. (2d) 719, the Court of Appeals of New York reaffirmed its view that an incontestable clause, such as that in our case, does not prevent rescission for fraud of the disability and double indemnity provisions of a policy even after the period designated in the incontestable clause has expired.

A well considered case is *Smith v. Equitable Life Assur. Soc.*, 169 Tenn. 477, 89 S. W. (2d) 165. The Supreme Court of Tennessee there held in accord with the Courts below in the case at bar. The opinion is in part as follows (pp. 482-484):

"The language for construction (condensed by omitting matter not relevant to the issues under consideration) is: 'This policy, except as to the provisions relating to disability * * *, shall be incontestable after,' etc. How can it be said, in the face of this quite definite excepting language, that it was intended to declare the policy to be incontestable as to its provisions for disability? The phrase 'relating to' is the equivalent of pertaining to, having reference to (Webster's New International), terms that are comprehensive of the subject indicated. As we understand the argument made for the insured, it is that the exception should be construed to apply, not to the general obligation, as a whole, to pay disability insurance, but only to the right to deny liability because certain prescribed conditions of liability applicable to claims arising under these heads have not been complied with, such as, under a claim for total and permanent disability, giving of notice and filing of proofs thereof within stipulated periods, or because the disability has resulted from military or naval service, or from self-inflicted injury. It is said that it was to preserve to the society the right to contest touching these matters after one year that the exception was inserted.

"We think it apparent that the confusion which seems to have arisen in this case, and in several of those relied on for the insured, is due to a failure to appreciate the distinction between 'a denial of coverage and a defense of invalidity' which Chief Justice Cardozo, when on the Court of Appeals of New York, so clearly emphasized in his opinion in *Metropolitan Life Ins. Co. v. Conway,* 252 N. Y., 449 169 N. E., 642. In that case he said: 'The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a

period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken.'

"There could be no possible necessity for the insertion of a clause reserving by exception the right to contest a claim for payment based on disability on the ground that the claim did not come within the terms of coverage, that is, the conditions upon and under which the insurance was to be paid, for example, a showing that the disability was total and permanent, and was not self-inflicted. Such rights of defense are never affected by time limitations relating to the execution of the contract, or issuance of the policy, but arise only and may be asserted whenever claims are made under the contract."

The Supreme Court of Tennessee in that case also said (pp. 486-487):

"As illustrating the very distinction which Chief Justice Cardozo emphasizes, and which the South Carolina Court* altogether overlooks, that court sets forth in its opinion items, all clearly of coverage, which it says are 'the provisions relating to disability' intended to be excepted from contestability by the use of the language employed. Says that court:

" 'It will be seen from a study of the disability clause that there are many provisions which have to be complied with before the insured claiming disability can be paid thereunder.

" '(1) The insured must show that he cannot

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* In *Kiriakides v. Equitable Life Assur. Soc.*, 174 S. C. 140, 177 S. E. 40.

engage in any work for compensation of financial value.

"'(2) The insured must show that the disability will continue for a certain period unless it involves the loss of sight or certain other injuries enumerated therein.

"'(3) The company will not pay, in any event, any disability resulting directly or indirectly from military or naval service in time of war.

"'(4) The due proof must be made within one year after default in payment of premium and must show that the insured became totally disabled as provided in the policy.

"'(5) If the insured has not reached the age of 60 years, the society will:

"'(a) Waive all premiums;

"'(b) Pay to the insured a monthly disability income.'

"We think it too plain for argument that every one of these provisions, or conditions, are with respect to matters as to which the exception as to incontestability could have no sort of reference. Every one of the items enumerated relate to matters of coverage, conditions of the contract to pay which the company could, of course, rely upon consistently with recognition of the validity of the contract of insurance and without respect to any limitation upon contestability. See *Scales v. Jefferson Standard Life Insurance Co.*, 155 Tenn., 412, 295 S. W., 58, 55 A. L. R., 537, and cases therein reviewed, in which the distinction is made clear between the right to contest for invalidity and the right to deny liability for violation of, or noncompliance with, the conditions of the risk assumed."

The precise question has also been decided in accord with the Courts below by the Supreme Court of Mississippi: *New York Life Ins. Co. v. Gresham,* 170 Miss. 211, 154 So. 547. The same form of policy was involved there as here. The action was brought by the insured for disability benefits after the contestable period had expired. The defense was fraud in the issuance of the policy. The lower court held that this defense was barred and accordingly directed a verdict for the plaintiff for the full amount asked by her. The Supreme Court of Mississippi reversed, holding that this defense was not barred and saying (p. 222):

> "The provisions and conditions relating to the disability and double indemnity benefits are expressly excepted from the incontestable clause of the policy, which reads as follows: 'This policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to disability and double indemnity benefits.'"

The question has also been recently decided by the Supreme Court of Arizona in *Greber v. Equitable Life Assurance Society,* 43 Ariz. 1, 28 P. (2d) 817. That was an action brought by the insured to recover disability benefits. The suit was not brought until after the period referred to in the incontestable clause had expired. The defense was that the insured had falsely answered questions in the application regarding his health. The insured contended that this defense was barred under the incontestable clause and the Arizona statutes. The incontestable clause in that case read as follows:

> "This policy, except as to the provisions relating to Disability and Double Indemnity, shall be incontestable after it has been in force during the lifetime of the Insured for a period of one year from

its date of issue provided premiums have been duly paid."

The Supreme Court of Arizona affirmed a judgment in favor of the defendant, the insurer, holding that the defense of fraud was not barred.

The Supreme Court of Washington is also in accord with the Courts below: *Millis v. Continental Life Ins. Co.*, 162 Wash. 555, 298 Pac. 739; *Paulson v. Montana Life Ins. Co.*, 181 Wash. 526, 43 P. (2d) 971. In the *Paulson* case, the Supreme Court of Washington held that the disability and double indemnity provisions remained contestable though the policy had been issued over five years and accordingly decided that, the policy having been procured by fraud, the "incidental features" for disability and double indemnity benefits should be cancelled. In the *Millis* case the Supreme Court of Washington said (p. 564):

> "The incontestable clause of the policy in the case at bar is not applicable to total and permanent disability benefits. The contract so provides. The parties stipulated in their contract that it
>
> '* * * shall be incontestable after one year from date of issue if the premiums are duly paid, except as provided under the provisions or conditions relating to benefits in the event of total and permanent disability.'"

A somewhat similar question was raised and decided in favor of the insurance company in *All States Life Ins. Co. v. Jaudon*, 228 Ala. 672, 154 So. 798. That case involved a statute rather than a clause in the policy itself. It was held that the statute did not apply to the provisions for disability benefits in a life policy. In an annotation to that case in 94 A. L. R. 1133, it is said (p. 1134):

"And provisions in terms exempting provisions for disability benefits from the operation of incontestable clauses have, in most instances, been held to remove entirely such provisions from the operation of such clauses."

A well reasoned case is *Guardian Life Ins. Co. v. Barry,* 10 N. E. (2d) 614, decided by the Supreme Court of Indiana on October 26, 1937. That was an action brought by the insured for disability benefits more than two years after the policy had been issued, and the defense was false answers in the original application. The policy contained an incontestable clause reading as follows: "This policy shall be incontestable after it has been in force during the lifetime of the Insured for a period of one year from its date of issue, except for nonpayment of premium, and except as to provisions and conditions relating to benefits in the event of total and permanent disability and those granting additional insurance specifically against death from accident, * * * " It was held that the incontestable clause did not bar the defense of fraud in the application. The opinion is in part as follows (p. 619):

"In the policies in the Ness and Stroehmann Cases there is a basis in the limited language of the exception for a doubt as to whether there was an intention to reserve the right to attack the policy for fraud or misrepresentation. There is no such basis here, and, since the exception deals with the right to contest the policy, and since the word 'contest' should be given its usual and ordinary meaning where there is nothing to indicate that a different meaning was intended, it must be concluded that it was intended to refer to actions which would effect a rescission of the contract, and not to defenses which would merely seek a construction of the con-

tract with a view of determining the nature and extent of the risks covered."

Other cases in accord with the decisions below are: *New York Life Ins. Co. v. Davis,* 5 F. Supp. 316, 319; *Penn Mutual Life Ins. Co. v. Joseph,* 5 F. Supp. 1003, 1004; *Mutual Life Ins. Co. v. McConnell,* 20 D. & C. 250, 251 (Pa.); *Penn Mutual Life Ins. Co. v. Hartle,* 165 Md. 120, 124, 166 A. 614; and *Schaedler v. New York Life Ins. Co.,* 276 N. W. 235 (Minn.).

Passing to the cases cited by the petitioners, there is the decision of the Fourth Circuit in *Ness v. Mutual Life Ins. Co.,* 70 F. (2d) 59. The incontestable clause before the court in that case is materially different from that before this Court. The exception in the incontestable clause in that case read as follows:

"except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively."

There was a promise to pay disability and double indemnity benefits on the face of the policy. Sections 1 and 3 were specifically so identified in the policy and contained detailed terms relating to disability and double indemnity benefits. It will thus be seen that the exception to the incontestability clause in the *Ness* case was specifically restricted to what was contained in the sections designated 1 and 3. The court therefore held that the exception in the incontestable clause was specifically withdrawn from the covenants to pay disability and double indemnity benefits not contained in sections 1 and 3. To this effect the court in that case said (p. 61):

"The exception which we are considering was clearly intended to except certain defenses from the operation of that clause; and, equally clearly, the defenses so excepted were those enumerated in the sections

to which specific reference was made, *i. e.*, sections 1 and 3."

In the case at bar, on the contrary, the second exception to the incontestable clause is not limited to any part of the provisions and conditions relating to disability and double indemnity benefits. The language of the exception in the case at bar is unlimited and therefore embraces all of the provisions and conditions relating to disability and double indemnity benefits wherever found in the policy. The *Ness* case involved the same incontestable clause as *Stroehmann v. Mutual Life Ins. Co., supra,* and is, therefore, subject to the same distinction which this Court in the latter case pointed out between it and the very case now before this Court.

In *Equitable Life Assur. Soc. v. Deem,* 91 F. (2d) 569, the Circuit Court of Appeals for the Fourth Circuit itself decided that the incontestable clause then before it did not apply to the disability benefits provided by a policy, distinguishing its prior decision in the *Ness* case. The opinion contains an enlightening historical review of the incontestable clause. When reading that it should be noted that the respondent in the case at bar is also a New York corporation (R. 2). After stating that the question at issue was whether the wording of the incontestable clause disclosed a purpose to except the disability benefits, the court said what we submit is applicable to the case at bar, as follows (p. 573):

> "In our opinion it does. This is the effect of the words used in their plain meaning. There is no ambiguity or uncertainty in the phrase. The wording is naturally that which comes to mind to express the thought intended. It is, in abbreviated form, in the very words used in the statute, and as expressed in the Supreme Court opinion, supra. The exception, 'as to the provisions relating to Disability

and Double Indemnity' is comprehensive in scope, applying to all such provisions in the policy. Smith v. Equitable Life Assur. Soc., 169 Tenn. 477, 89 S. W. (2d) 165. And the exception directly relates to the 'policy,' that is it excepts the part of the policy which *grants* the disability benefits as an obligation of the company. The phrase does not grammatically modify the word 'incontestable' and thus merely affect the causes of contest, but relates to the whole subject matter of the policy insofar as it covers liability of the company for disability benefits. The policy as a whole includes three separate kinds of insurance, which constitute in reality three major promises of insurance protection, life, accident and disability. It seems entirely clear that the insurer intended to avail itself of the statutory authority to make the incontestable clause inapplicable to the latter two of these risks, and thus excepted from the clause those provisions of the policy relating to them."

The petitioners also rely heavily upon *Mutual Life Ins. Co. v. Markowitz,* 78 F. (2d) 396 and *New York Life Ins. Co. v. Kaufman, supra,* decided simultaneously by the Circuit Court of Appeals for the Ninth Circuit. The fact that a certiorari was denied in those cases is not to be construed as any expression by this Court upon the merits of the question involved, as this Court has repeatedly declared: *Hamilton-Brown Shoe Co. v. Wolf Bros.,* 240 U. S. 251, 258; *U. S. v. Carver,* 260 U. S. 482, 490.

Mutual Life Ins. Co. v. Markowitz, supra, involved the same incontestable clause as *Ness v. Mutual Life Ins. Co., supra,* and *Stroehmann v. Mutual Life Ins. Co., supra,* which we have already seen is materially different from that now before this Court in that the excep-

tion to the incontestable clause there involved was expressly limited to only a part of the provisions applying to double indemnity and disability benefits. That this distinction was a material factor in the court's decision in the *Markowitz* case appears from the following excerpt from its opinion (pp. 397-398):

> "The clause, however, excepts only the restrictions and provisions applying to disability benefits 'as provided in Section * * * 3' of the policy.
>
> The restrictions and provisions of section 3 are the same as those in the policy considered in the Ness Case. We are in agreement with the analysis of the opinion in that case leading to the conclusion that there is no ambiguity in the clause; that it clearly provides that the company saved its right to contest only in matters arising from the restrictions and provisions specifically set forth in section 3; and that the disability insurance is incontestable as to causes growing out of acts of the insured in its procurement."

The court in the *Markowitz* case further emphasizes the difference between the incontestability clause before it and the one now before this Court by indicating that the insurance company would have prevailed if its incontestability clause had read: "The insurance against death in this Policy is incontestable, except for the nonpayment of premiums and for the restrictions and provisions applying to double indemnity, after one year from its date of issue." That is substantially the wording of the exception before this Court. The exception before this Court reads: "except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits." Under the decision of the Ninth Circuit in the *Markowitz* case, therefore, the decisions of the Courts below should be affirmed.

In the *Kaufman* case it seems doubtful whether the court was required to pass upon the incontestability clause, for it said (p. 401):

> "Unlike the case of *Mutual Life Ins. Co. v. Markowitz* (C. C. A.) 78 F. (2d) 396, argued with this case and to-day decided, the common-law cause of the bill here is for but $900, and, since not transferable to the law side, the court has no occasion to determine whether transfer is refusable because the bill shows no cause of action at all."

The court in the *Kaufman* case relied somewhat upon a "double division of the whole contract" into policy and application. In this connection, the court suggested that the incontestable clause should have been worded to read (p. 404): "This *entire contract* shall be incontestable * * * except as to provisions and conditions relating to Disability Benefits". If the application is not part of the policy, then the incontestable clause should not apply to the application at all, in which event fraud in the answers in the application could be raised as a defense at any time.

The court in the *Kaufman* case also suggests that the incontestable clause, if intended to mean what the company contended, should read as follows (p. 402): "The *life* insurance of this policy is incontestable after two years, except for non-payment of premiums." Such a "simple statement" would clearly not suffice, however, because the petitioners argued below that double indemnity for accidental death is "life insurance" and there is authority to that effect: *N. Y. Life Ins. Co. v. Rositzky*, 45 F. (2d) 758. Consequently, if the "simple statement" suggested in the *Kaufman* case were used it would certainly be contended by others that there was no exception to take the double indemnity provisions

out of the incontestable clause. It is respectfully submitted that the *Kaufman* case should not be followed in the instant case.

So far as *Thompson v. New York Life Ins. Co.*, 9 F. Supp. 248, is concerned, the decision of the lower court was not concurred in by the Circuit Court of Appeals for the Tenth Circuit. The lower court based its decision wholly upon the contention urged by our opponents. The Circuit Court, while it affirmed, said (78 F. (2d) 946, 947):

> "Affirming the decree below on the first ground, as we do, is not to be understood as an affirmance on the ground ruled below; we leave the question open until it is proper for us to decide it."

If the Circuit Court of Appeals for the Tenth Circuit had been in accord with Judge Kennamer, the natural thing for it to have done would have been to have affirmed on the one and only reason upon which he based his decision. Evidently the Circuit Court of Appeals was not prepared to agree with the lower court's opinion in the *Thompson* case.

The petitioners quote at length from *New York Life Ins. Co. v. Thomas*, 27 D. & C. 215, a decision by a common pleas court. That case is overruled by the later case of *Guise v. New York Life Ins. Co., supra*, a decision by an appellate court of Pennsylvania.

Mutual Life Ins. Co. v. Margolis, 11 Cal. App. (2d) 382, 53 P. (2d) 1017, also cited by the petitioners, involved the same incontestable clause as the *Stroehmann, Ness* and *Markowitz* cases, already discussed, and is, therefore, subject to the same distinction.

New York Life Ins. Co. v. Truesdale, 79 F. (2d) 481 (C. C. A. 4); *New York Life Ins. Co. v. Yerys*, 80 F. (2d)

264 (C. C. A. 4) and *Horwitz v. New York Life Ins. Co.*, 80 F. (2d) 295 (C. C. A. 9), are simply cases in which the Circuit Courts for the Fourth and Ninth Circuits followed their prior decisions in *Ness v. Mutual Life Ins. Co., supra; Mutual Life Ins. Co. v. Markowitz, supra,* and *New York Life Ins. Co. v. Kaufman, supra,* and are not well considered cases.

Wilson v. Equitable Life Ins. Co., 220 Iowa 321, 262 N. W. 525, also listed by the petitioners as supporting their contention, involved an incontestable clause reading as follows:

> "This policy shall be incontestable after one year from the date of issue, except for non-payment of premium and except as provided in paragraphs 14 and 15 relating to Disability benefits."

Paragraphs 14 and 15 of the policy involved in the *Wilson* case corresponded with Sections 1 and 3 of The Mutual Life Insurance Company policy, and as the court noted in its opinion (220 Iowa 327), "All the provisions with reference to the total and permanent disability benefits are not covered in paragraphs 14 and 15 of the policy." The *Wilson* case is, therefore, subject to the same distinction as the *Stroehmann, Ness, Markowitz* and *Margolis* cases, *supra.* The opinion in the *Wilson* case shows that the court based its decision upon the proposition that the exception was limited to the contents of paragraphs 14 and 15 of the policy, and did not embrace all of the provisions of the policy regarding disability benefits. One sentence from the opinion is as follows (p. 325): (Italics by the court)

> "Analyzing this sentence (the incontestable clause), the policy was made incontestable except *'as provided in paragraphs 14 and 15.'*"

From this review of the cases, both pro and con, in which the precise question under consideration has been considered, it is clear that the numerical weight of authority is in accord with the Courts below. Whatever may be said concerning the correctness of the few cases which reached a contrary decision, in the light of their own facts, it is submitted that so far as the case at bar is concerned the numerical weight of authority also is the line of precedents which should be followed. Logic and principle demonstrate that the view of the numerical weight of authority is the correct one to be applied to the case at bar. This is also the conclusion which, we submit, is reached by an independent analysis and consideration of the question involved without reference to the cases in which the precise question has been decided. The other policyholders of this mutual company should not be denied the opportunity to prove whether a fraud was committed upon them in the obtaining of the disability and double indemnity insurance in question.

The decisions of the District Court and of the Circuit Court of Appeals should, therefore, be affirmed.

Respectfully submitted,

LOUIS H. COOKE,
WILLIAM H. ECKERT,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 596.—October Term, 1937.

John G. Ruhlin et al., Petitioners, *vs.* New York Life Insurance Company.	On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 2, 1938.]

Mr. Justice Reed delivered the opinion of the Court.

On February 14, 1935, the New York Life Insurance Company, respondent here, filed its bill of complaint in the District Court for Western Pennsylvania to rescind, because of certain misrepresentations, the disability and double indemnity provisions in five policies issued on the life of defendant John G. Ruhlin, and made in favor of the other defendants as beneficiaries.

The bill alleged that the plaintiff is a mutual life insurance company incorporated under the laws of the State of New York and lawfully engaged in business in Pittsburgh, Pa.; that the defendants are temporarily living in Pennsylvania, though plaintiff does not know where their legal residence is; that on December 1, 1928, plaintiff wrote two policies of life insurance on the life of John G. Ruhlin, in the face amounts of $10,000 and $5,000; that on July 7, 1930, it wrote three additional, similar policies in the face amount of $4,000 each; that certain questions in the applications were answered falsely and fraudulently by the insured; that on November 1, 1934, John G. Ruhlin presented a claim for total and permanent disability benefits under each of the five policies. The Company tendered into court the sum of $1,045.42, the aggregate amount of premiums paid for disability and double indemnity benefits, and prayed that the disability and double indemnity provisions be rescinded, and for other relief not material here.

The defendants filed a motion to dismiss the complaint on the ground that the policies had become incontestable, since the suit was brought more than two years after the date of each policy

involved. The "incontestability clause" of each of the policies reads as follows:

"Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

The District Court overruled the motion to dismiss. The Circuit Court of Appeals affirmed the order, holding that, in view of their express terms, the incontestability clauses had no application to liability for disability and double indemnity benefits. It recognized that its decision was contrary to that reached by the Circuit Court of Appeals for the Ninth Circuit, (*New York Life Insurance Company* v. *Kaufman*, 78 F. (2d) 398), and by the Circuit Court of Appeals for the Fourth Circuit, (*New York Life Insurance Company* v. *Truesdale*, 79 F. (2d) 481), which had held that the exception in the incontestability clause related only to provisions and conditions actually set forth in the policy itself, compare *Stroehmann* v. *Mutual Life Insurance Co.*, 300 U. S. 435, and that fraud was not mentioned in any of those provisions. Ruhlin petitioned for certiorari, asserting the conflict of circuits. The Company filed a memorandum admitting the conflict, and raising no objection to the granting of the writ. Because of the conflict of circuits, the Court granted certiorari. — U. S. —.

It was stated in *Carpenter* v. *Providence Washington Insurance Co.*, 16 Pet. 495, 511, that questions concerning the proper construction of contracts of insurance are "questions of general commercial law," and that state decisions on the subject, though entitled to great respect, "cannot conclude the judgment of this court." A limitation was put on this doctrine in *Mutual Life Ins. Co.* v. *Johnson*, 293 U. S. 335, 340. Putting aside all questions of power, the Court interpreted a specific provision of an insurance contract in accordance with the decision of the highest court of the State of Virginia, where delivery was made. "All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one. With choice so 'balanced with doubt,' we accept as our guide the law declared by the state where the contract had its being." The decision in *Erie Railroad Co.* v. *Tompkins*, — U. S. —, No. 367, decided April 25, 1938, goes further, and settles the question of power. The subject

is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court. The doctrine applies though the question of construction arises not in an action at law, but in a suit in equity. Compare *Mason* v. *United States,* 260 U. S. 545, 557, 558.

Had *Erie Railroad* v. *Tompkins* been announced at some prior date the course of this case might have been different. This Court might not have issued a writ of certiorari. Rule 38(5) of the Supreme Court Rules indicates that this Court will consider, as a reason for granting a writ of certiorari, the fact that "a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter." Since jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given to this Court in order "to secure uniformity of decision," *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163, a showing of a conflict of circuits on a matter concerning which the federal courts had never denied their right to independent judgment prompted this Court to grant the writ. E. g., *Aschenbrenner* v. *United States Fid. & G. Co.,* 292 U. S. 80, 82; *Stroehmann* v. *Mutual Life Ins. Co.,* 300 U. S. 435, 440. As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions." No such showing was attempted by the petition. Nor was it contended that the decision below was "probably untenable" and therefore probably in conflict with the state law as yet unannounced by the highest court of the State.

No decision at the present time could reconcile any "conflict of circuits," or do more than enunciate a tentative rule to guide particular federal courts. Therefore, even assuming that it is adequately presented on the record, we decline to decide the issue of state law. However, we shall not dismiss the writ of certiorari as improvidently granted. In view of the fact that the question in the case was regarded below, both by the courts and by counsel, as one of "general" or "federal" law, the interest of justice requires that the judgment be vacated and the cause remanded for

the enforcement of the applicable principles of state law. See *Villa* v. *Van Schaick*, 299 U. S. 152, 155-156; *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 267-268; *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21.

It is true that the Circuit Court of Appeals, in rendering judgment on reargument, said (see 93 F. (2d) 416, 417):

Furthermore, both the Court of Appeals of New York and the Supreme Court of Pennsylvania have held that the incontestability clause here involved clearly excepts the double indemnity and disability provisions from its operation. Steinberg *v.* New York Life Ins. Co., 263 N. Y. 45, 188 N. E. 15; Manhattan Life Insurance Co. *v.* Schwartz, 9 N. E. (2) 16; Guise *v.* New York Life Ins. Co., 191 Atl. 626. We have read the recent opinion of the Supreme Court of California in the case of Coodley *v.* New York Life Insurance Co., — Cal. —, and the opinion of Judge Coughlin in the case of New York Life Insurance Co. *v.* Thomas, 27 D. & C. 215, but are not persuaded that the learned District Judge erred. Since the company is domiciled in New York and the insured lives in Pennsylvania and "all that is here for our consideration is the meaning, the tacit implications, of a particular set of words," "for the sake of harmony and to avoid confusion" we shall follow the decision of those courts and hold that the insurance company is not barred by the incontestability clause from rescinding the double indemnity and disability provisions. Mutual Life Ins. Co. *v.* Johnson, 293 U. S. 340; Trainor *v.* Aetna Casualty Company, 290 U. S. 47, 54.

It is not necessary here to consider whether, in the determination of the substantive Pennsylvania rule, the Circuit Court of Appeals was correct in declining to follow the *nisi prius Thomas* case, directly in point, and in applying the *Guise* case, which was decided by an intermediate appellate court (127 Pa. Super. 127), and not the supreme court of the state as the court below stated, and which involved a defense of coverage, available even under an ordinary incontestability clause as the opinion in the *Guise* case clearly states (127 Pa. Super. at 133).[1]

A different case might have been presented, and the facts and authorities developed in another fashion, if the parties had had in mind from the first the rule the Pennsylvania court would have applied.

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[1] The Superior Court said (127 Pa. Super. at 133):

"An examination of the clauses discloses that the disability provisions of the policies are expressly excluded from their operation. Even if that exemption had not been inserted, the clauses would not have prevented the interposition of the defense here set up. Mayer *v.* Prudential Life Insurance Company of America, 121 Pa. Superior Ct. 475, 184 A. 267."

The pleadings might have shown in what place the policy was delivered,[2] and perhaps other facts attending the making of the insurance contract. It may be noted that petitioner's brief asserts, without record reference, that the applications for the first two policies were made in Pennsylvania, and the application for the remaining three policies were made in Ohio. But as the record stands, we know only that at the time of bringing suit the respondent Company was incorporated in New York, and lawfully engaged in business in Pittsburgh, and that the defendants were then temporarily living in Pennsylvania.

Application of the "State law" to the present case, or any other controversy controlled by *Erie R. Co.* v. *Tompkins,* does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of "general" law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of "local" law.

The judgment is vacated and the cause remanded to the District Court, for further proceedings in conformity with this opinion, with directions to permit such amendments of the pleadings as may be necessary for that purpose.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[2] Under the general doctrine the interpretation of an insurance contract depends on the law of the place where the policy is delivered. Mutual L. Ins. Co. *v.* Johnson, 293 U. S. at 339. We do not now determine which principle must be enforced if the Pennsylvania courts follow a different conflict of laws rule.